No. 2204

United States
Circuit Court of Appeals
For the Ninth Circuit.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Superior Court of the County of Humboldt, State of California.

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation, and THOMAS E. ATKINSON,

Defendants.

Order for Removal to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of the State of California.

The defendant Metropolitan Redwood Lumber Company having within the time provided by law filed its petition for the removal of the above-entitled cause to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, and having at the same time offered a bond in the sum of Three Hundred (300) Dollars with a good and sufficient surety, pursuant to the statute in such cases made and provided and conditioned according to law:

NOW, THEREFORE, THE COURT DOES HEREBY APPROVE and accept said petition, and does order that this cause be removed for trial to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, pursuant to the Statute of the United States in such cases made and provided, and that all

further proceedings of this court be stayed.

Dated Sep. 8, 1911.

CLIFTON H. CONNICK,

Judge.

Filed Sept. 8, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. [1*]

In the Superior Court of the County of Humboldt, State of California.

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation, and THOMAS E. ATKINSON,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, United States Fidelity and Guaranty Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland and duly licensed to transact a surety business within the State of California is held and firmly bound unto the above-entitled plaintiff, his heirs, executors, administrators and assigns, in the sum of Three Hundred (300) Dollars, lawful money of the United States of America, for the payment of which sum well and truly to be made the undersigned surety binds itself, its successors and

*Page-number appearing at foot of page of original certified Record.

assigns, firmly by these presents.

THE CONDITION of this obligation is such that whereas, the defendant Metropolitan Redwood Lumber Company, a corporation, has applied by petition to the above-entitled court for the removal of the above-entitled cause to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of the State of California, for further proceedings, on the grounds in the said petition set forth, and that all proceedings in said action in said Superior Court be stayed:

NOW, THEREFORE, if the said petitioner the Metropolitan Redwood Lumber Company shall enter in said Circuit Court of the **[2]** United States, Ninth Judicial Circuit, in and for the Northern District of California, on or before the first day of the next ensuing session, a copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said surety has caused its corporate name and seal to be hereunto affixed, this 19th day of July, 1911.

THE UNITED STATES FIDELITY & GUARANTY COMPANY.

By PETER BELCHER, [Seal]

Attorney in Fact.

[Endorsed]: Filed July 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy.

[3]

State of California,
County of Humboldt,—ss.

On this 19th day of July, A. D. 1911, before me, J. P. Mahan, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Peter Belcher, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company, and the said Peter Belcher acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereunto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the County of Humboldt, the day and year in this certificate first above written.

[Seal] J. P. MAHAN,
Notary Public, in and for said County of Humboldt, State of California.

[Endorsed]: Filed July 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. [4]

[Affidavit of Thomas G. Atkinson.]

In the Superior Court of the County of Humboldt, State of California.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation) and THOMAS E. ATKINSON,

Defendants.

State of California,
County of Humboldt,—ss.

Thomas G. Atkinson, being first duly sworn, deposes and says, that he is one of the defendants named in the above-entitled action and erroneously called Thomas E. Atkinson; that he is now and was at all times in said complaint mentioned a resident of the County of Humboldt, State of California.

That he is now and was, at all times in said complaint mentioned, the General Superintendent and Manager of the Metropolitan Redwood Lumber Company, a corporation, the other of said defendants above named; that he is one of the stockholders of said corporation the Metropolitan Redwood Lumber Company, and has no interest or estate in any of the property of said corporation, other than the interest and estate which he owns by virtue of being one of the stockholders thereof; that he has never at any of the times mentioned in said complaint, or at all, conducted or been interested in any business what-

ever with the said corporation as an individual, or in any [5] other capacity, except as a stockholder of said corporation and as the General Superintendent and Manager thereof, and has no interest in any of the property of said corporation and particularly the property described in the complaint herein, except as aforesaid.

That on the 15th day of August, 1910, and at the time the plaintiff above named was injured as alleged in said complaint herein, and for some time prior thereto, your affiant was absent from the county of Humboldt. And your affiant further avers that he has been joined as defendant herein fraudulently and not in good faith, and for the sole purpose of preventing the removal of this action to the Circuit Court of the United States, as petitioned for by the said corporation.

THOMAS G. ATKINSON.

Subscribed and sworn to before me this 12 day of August, 1911.

[Seal] OTTO C. GREGOR,

Notary Public in and for the County of Humboldt, State of California.

Due service and a copy of within admitted this 15th day of Aug., 1911.

PUTER & QUINN,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 16, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. [6]

In the Superior Court of the County of Humboldt, State of California.

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation, and THOMAS E. ATKINSON,

Defendants.

Petition for Removal of Cause on the Grounds of Diverse Citizenship to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

To the Honorable the Superior Court of the State of California, in and for the County of Humboldt.

Your petitioner, Metropolitan Redwood Lumber Company, respectfully shows:

I.

That it is one of the defendants in the above-entitled action; that said action has heretofore been commenced in the above-entitled court against your petitioner and Thomas E. Atkinson; that said action is of a civil nature.

II.

That the time has not elapsed within which your petitioner is allowed under the rules of practice, the laws of this State and the rules of this court to appear in the said action and plead to the complaint on file herein, or to take such other action herein as it

may deem proper, and that your petitioner has not heretofore appeared herein or filed any pleadings or made any motion in the above-entitled action.

III.

That the plaintiff in the above-entitled action claims in substance that he is entitled to recover from the defendants the sum of Twenty-five Thousand (25,000) Dollars, as damages by reason of the alleged negligence of each of said defendants in the conduct of certain logging operations, whereby it is alleged in said complaint [7] the plaintiff was injured.

IV.

That your petitioner disputes said claim and denies any and all liability by reason of any of the matters and things set forth in said complaint.

V.

That the matter in dispute in this action exceeds the sum of Two Thousand (2,000) Dollars, exclusive of interest and costs.

VI.

That at the time of the filing of the complaint herein, and at all of the times in said complaint mentioned, your petitioner was and now is a corporation organized and existing under and by virtue of the laws of the State of Michigan.

VII.

That the controversy in this action between said plaintiff and your petitioner is wholly between a citizen of the State of California on the one side and a corporation organized and existing under and by virtue of the laws of the State of Michigan on the

other side; that said controversy is a separable one, and that while a resident of this State has also been joined as defendant herein, your petitioner is informed and believes, and on such information and belief alleges, that said joinder was made fraudulently and not in good faith, and was made for the purpose of preventing the removal of this action to the Circuit Court of the United States.

VIII.

That your petitioner presents herewith a good and sufficient bond as provided by the Statute of the United States in such cases.

YOUR PETITIONER THEREFORE PRAYS that this Honorable Court proceed no further herein, excepting to make an order of removal as required by law, and to accept the bond presented herewith, and that a transcript of the record herein be directed to be made and **[8]** filed in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, as provided by law.

METROPOLITAN REDWOOD LUMBER COMPANY.

By THOMAS G. ATKINSON,
President.

OTTO C. GREGOR and
MAHAN & MAHAN,
Attorneys for Petitioner.

State of California,
County of Humboldt,—ss.

Thomas G. Atkinson, being duly sworn, deposes and says: That deponent is an officer, to wit, the

President of the Metropolitan Redwood Lumber Company, a corporation, one of the defendants in the above-entitled action; that deponent has read the above and foregoing petition and knows the contents thereof; that the same is true of deponent's own knowledge except as to the matters which are therein stated on deponent's information or belief; and as to those matters, that deponent believes it to be true; that said defendant is a corporation, and deponent makes this verification for it and on its behalf.

THOMAS G. ATKINSON.

Subscribed and sworn to before me this 19th day of July, 1911.

[Seal] J. P. MAHAN,

Notary Public in and for the County of Humboldt, State of California.

Due service of the within petition is hereby admitted this 20th day of July, 1911.

PUTER & QUINN,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. **[9]**

In the Superior Court of the County of Humboldt, State of California.

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation, and THOMAS E. ATKINSON,

Defendants.

Demurrer [of Thomas G. Atkinson].

Now comes the above-named defendant, Thomas G. Atkinson, erroneously named in the complaint as Thomas E. Atkinson, and demurs to the Complaint on file herein, and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant Thomas G. Atkinson.

II.

That there is a misjoinder of parties defendant in this, that it appears from said complaint that defendant Thomas E. Atkinson is improperly joined as defendant in said cause, for the reason that it further appears from said complaint that no cause of action exists against him.

III.

That said complaint is unintelligible in this, that it cannot be known or determined therefrom whether plaintiff claims that his alleged injuries

were occasioned or caused by the negligence of the Metropolitan Redwood Lumber Company or by the negligence of Thomas E. Atkinson, or by the joint negligence of both of said defendants.

OTTO C. GREGOR and
MAHAN & MAHAN,
Attorneys for Defendant Thomas G. Atkinson. **[10]**

[Endorsed]: Due service of the within demurrer is hereby admitted this 18th day of Aug., 1911.

PUTER & QUINN,
Attorneys for Plaintiff.

Filed August 18, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. **[11]**

In the Superior Court of the County of Humboldt, State of California.

No. 6055.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation, and THOMAS E. ATKINSON,

Defendants.

Demurrer [of Metropolitan Redwood Lumber Company].

Now comes Metropolitan Redwood Lumber Company, one of the defendants herein, and demurs to plaintiff's complaint herein upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

II.

That there is a misjoinder of parties defendant herein in this, that each defendant herein is joined to each of the other defendants herein, and that no ground for such joinder is shown.

III.

That several causes of action have been improperly united, to wit, a cause of action against defendant Metropolitan Redwood Lumber Company, and a cause of action against defendant Thomas E. Atkinson.

WHEREFORE defendant prays to be hence dismissed.

OTTO C. GREGOR and
MAHAN & MAHAN,
Attorneys for said Defendant.

[Endorsed]: Due service of the within demurrer is hereby admitted this 20th day of July, 1911.

PUTER & QUINN,
Attorneys for the Plaintiff.

Filed Jul. 20, 1911. Geo. W. Cousins, County Clerk. By F. M. Kay, Deputy. **[12]**

Summons.

In the Superior Court of the County of Humboldt, State of California.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation) and THOMAS E. ATKINSON,

Defendants.

Action brought in the Superior Court of the County of Humboldt, State of California, and the Complaint filed in the Office of the Clerk of said County of Humboldt.

PUTER & QUINN,
Attorneys for Plaintiff.

The People of the State of California Send Greeting to Metropolitan Redwood Lumber Company (a Corporation) and Thomas E. Atkinson, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the Complaint in action entitled as above, brought against you in the Superior Court of the County of Humboldt, State of California, within ten days after the service on you of this Summons, if served within this county or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract,

or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and the seal of the Superior Court of the County of Humboldt, State of California, this 27th day of June, A. D. 1911.

[Seal] GEO. W. COUSINS,
Clerk.
By I. H. Cousins,
Deputy Clerk. **[13]**

Sheriff's Office,
County of .....,
State of California,—ss.

I HEREBY CERTIFY that I received the within Summons on the 29th day of June, A. D. 1911, and personally served the same upon Thomas E. Atkinson, managing agent for the company, a corporation, by delivering to and leaving with Thomas E. Atkinson the managing agent of said Metropolitan Lumber Company, a corporation, in the County of Humboldt, State of California, on the 30th day of June, A. D. 1911, a copy of said Summons; and that the copy Summons so delivered to and left with said Thomas E. Atkinson as managing agent of said defendant corporation, was attached to a copy of the Complaint in said action.

Dated at Rio Dell, this 30th day of June, A. D. 1911.

R. A. REDMOND,
Sheriff.
By Lloyd Brown,
Deputy Sheriff.

Sheriff's Fees, $.....

[Endorsed]: Filed July 3, 1911. Geo. W. Cousins, Clerk. By I. H. Cousins, Deputy Clerk.

Office of the Sheriff
Of the County of Humboldt.

I hereby certify that I received the within Summons on the 29th day of June, 1911, and personally served the same on the 30th day of June, 1911, Thomas E. Atkinson being one of the defendants named in said summons, by delivering to said defendant, personally, in the County of Humboldt, State of California, a copy of said Summons, and a true and correct copy of the complaint in the action named in said Summons attached to said copy of Summons.

Dated this 30 day of June, 1911.

E. A. REDMOND,
Sheriff.
By Lloyd Brown,
Deputy Sheriff. **[14]**

In the Superior Court of the County of Humboldt, State of California.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation) and THOMAS E. ATKINSON,

Defendants.

Complaint.

Now comes the plaintiff complaining against de-

fendants, and for cause of action alleges:

I.

That the said defendant the Metropolitan Redwood Lumber Company is now, and at all times hereafter mentioned has been, a corporation duly formed, organized and existing under and by virtue of the laws of the State of Michigan, and has its principal place of business in the city of Eureka, county of Humboldt, State of California.

II.

That said defendant Thomas E. Atkinson is now, and at all times herein mentioned was, the General Superintendent and Manager of said defendant corporation, the Metropolitan Redwood Lumber Company.

III.

That on or about the 15th day of August, 1910, and for a long time prior thereto, the defendants conducted logging operations on lands near Howe Creek, in said County of Humboldt, State of California; that said logging operations consisted in cutting down or felling redwood and fir trees, converting the same into sawlogs and hauling or dragging said sawlogs by means of a wire cable attached to a steam engine, otherwise known as a Compound Yarder Donkey, to a landing from which said sawlogs were transported by a railroad to a sawmill to be manufactured into lumber. That said cable was about one and one-quarter inches in diameter, and used for the purpose of **[15]** hauling or dragging one sawlog at a time over and along the road or dragway to the said landing, a distance

of about four hundred yards. That said road or dragway conformed to the lay of the land and has two straight courses, to wit: the said road or dragway ran in a straight course from said landing, a distance of about three hundred feet, and then turned at about a right angle pursuing said last course to the point where the logs were hauled from; that at the point or angle on said road or dragway where said two straight courses meet, there was placed a "Tommy Moore" fastened to a large stump by means of a wire rope called a "Tommy Moore strap"; that said "Tommy Moore" consists of a large iron or steel block containing a swivel and weighing about 600 pounds. That said "Tommy Moore" was so placed for the purpose of keeping said cable in position, and was at all the times herein mentioned, used for that purpose. That said cable passed through the said "Tommy Moore" around the swivel therein contained and was thereby held in proper position. That said "Tommy Moore strap" consisted of a wire rope about one inch in diameter, and about 30 feet in length, the two ends of said wire rope being fastened to the "Tommy Moore" and the loop of said wire rope was placed over and around a redwood stump located on the side of said road or dragway opposite the point thereon where said "Tommy Moore" was placed as aforesaid.

IV.

That on or about the month of April, 1910, plaintiff was employed by defendant as a "chaser" on said road or dragway, and that plaintiff's duties under such employment were to take charge of said

"Tommy Moore"; to tend said cable and signal the engineer who had charge of said Compound Yarder Donkey when to stop and when to start said engine, while said sawlog was being hauled or dragged over and along said road or dragway to the said landing. That in the performance of said duties, the plaintiff was compelled to stand near the **[16]** said stump, around which the said "strap" was fastened as aforesaid, in order to tend said "Tommy Moore" and said cable and to give the said signals to the said engineer; that in order to give the said signals as aforesaid, it was necessary for the plaintiff to stand in a position in plain sight of the said engineer, and at a point on or near said road or dragway where plaintiff could have a plain view of both of said courses of said road or dragway.

V.

That the said "Tommy Moore strap" was so carelessly and negligently made and constructed by the said defendants that the said "Tommy Moore strap" at the time the plaintiff was injured by the breaking of said "Tommy Moore strap" as hereafter alleged was dangerous to use and operate in holding and keeping said "Tommy Moore" in place, and in that behalf plaintiff alleges: that said defendants carelessly and negligently made and constructed said "Tommy Moore strap" out of an old rusty, badly worn cable, about one inch in diameter, that did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said sawlogs were being hauled or dragged as aforesaid.

VI.

That common ordinary care and reasonable care and prudence required and demanded that said "Tommy Moore strap" should be made and constructed of wire rope having sufficient tensile strength to hold said "Tommy Moore" in place and withstand the strain thereon while said sawlog was being hauled or dragged along said road or dragway as aforesaid.

VII.

That said defendants carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore strap" as aforesaid, and on the 15th day of August, 1910, and at all times herein mentioned, said "Tommy Moore strap" was in an unsafe, dangerous and defective condition. [17]

VIII.

That said defendants so carelessly and negligently made, constructed, kept and maintained said "Tommy Moore strap" as aforesaid, that the same was, on the 15th day of August, 1910, and for a long time prior thereto, in an unsafe, defective and dangerous condition, in this, that the said "Tommy Moore strap" was made out of an old, badly worn, weak, rusty cable about one inch in diameter, that did not have or possess sufficient tensile strength to withstand the strain thereon, when said "Tommy Moore" was being used as aforesaid, and had no means of protection to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said

"Tommy Moore strap" should give way or break.

IX.

That said "Tommy Moore strap" was on the 15th day of August, 1910, and for a long time prior thereto had been, in the aforesaid defective, dangerous and unsafe condition. That the defendants knew of the said unsuitable, defective, dangerous and unsafe condition of said "Tommy Moore strap" as aforesaid, or might have known of the same by the exercise of ordinary care and diligence; but the said defendants carelessly and negligently permitted and suffered the same to remain in said unsuitable, defective, dangerous and unsafe condition and provided and maintained the same in said unsuitable, defective, dangerous and unsafe condition for the use as aforesaid, on said 15th day of August, 1910, and during all the times herein mentioned. That on the said 15th day of August, 1910, and while said "Tommy Moore strap" was in said unsafe, dangerous and defective condition, the plaintiff was engaged in performing the duties for which he was employed as aforesaid, and while so engaged and while working within about 20 feet of said "Tommy Moore," the said "Tommy Moore strap" broke by reason of the said unsafe, dangerous **[18]** and defective condition thereof, and struck plaintiff on the right hip and leg, thereby crushing and breaking the bones of said hip and leg and cutting, lacerating, bruising and injuring said hip and leg.

X.

That the *the* time of receiving said injury, and prior thereto, said plaintiff was an able-bodied man,

sound in limb and in good health, capable of doing manual labor in any capacity, and earning an income from said labor averaging eighty dollars per month; and by reason of said injury as aforesaid, plaintiff is permanently prevented from following his usual vocation and his earning capacity has been greatly reduced.

XI.

That by reason of said injury aforesaid, plaintiff's right hip and leg have become greatly impaired and injured, and as plaintiff is informed and believes, and therefore states the fact to be, that by reason of said injury the said hip and leg will always be weak and impaired, and that said leg, by reason of said injury, is now and always will be about two inches shorter than it was before said injury as aforesaid, and plaintiff will always be and remain a cripple by reason of said injury.

XII.

That as a result of said injury, which plaintiff hereby alleges to be permanent, plaintiff has suffered, and now suffers, great mental and physical pain and agony; and is now, and will be for the remainder of his life, greatly incapacitated from earning a livelihood, his right hip and leg permanently injured and weakened to his damage in the sum of Twenty-five Thousand Dollars.

WHEREFORE plaintiff demands judgment against defendant for the sum of Twenty-five Thousand Dollars, and for costs of suit herein expended.

PUTER & QUINN,
Attorneys for Plaintiff. [19]

State of California,
County of Humboldt,—ss.

Hugh Davis, being first duly sworn, deposes and says: That he is the plaintiff named in the above-entitled action; that he has heard read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HUGH DAVIS.

Subscribed and sworn to before me, this 27th day of June, 1911.

[Seal] L. F. PUTER,
Notary Public in and for the County of Humboldt, State of California.

[Endorsed]: Filed June 27th, 1911. Geo. W. Cousins, Clerk. By I. H. Cousins, Deputy Clerk. [20]

State of California,
County of Humboldt,—ss.

I, Geo. W. Cousins, County Clerk of the County of Humboldt, State of California, and ex-officio Clerk of the Superior Court in and for said Humboldt County (which is a court of record), do hereby certify that the foregoing are full, true and correct copies of the Original Complaint, Summons and service thereof, Demurrer of Metropolitan Redwood Lumber Company, Demurrer of Thomas E. Atkinson, Petition for Removal of Cause on the Ground

of Diverse Citizenship to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, Affidavit of Thomas E. Atkinson, Bond on Removal to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of the State of California, and Order of Removal in re Hugh Davis vs. Metropolitan Redwood Lumber Company, a corporation, and Thomas E. Atkinson, defendant, No. 6055 as the same now appears on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court of Humboldt County, this 20th day of Sept., A. D. 1911.

[Seal] GEO. W. COUSINS,

County Clerk and ex-officio Clerk of the Superior Court of Humboldt County.

[Endorsed]: Filed Oct. 30, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

At a stated term, to wit, the November term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Courtroom in the City and County of San Francisco, on Monday, the 27th day of November, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,390.

HUGH DAVIS

vs.

METROPOLITAN REDWOOD LUMBER COMPANY et al.

Order Sustaining Demurrers.

Now comes the plaintiff and confesses the demurrers to the complaint, and it is ordered that said demurrers be sustained, with leave to plaintiff to amend within twenty days. [22]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

TRANSFERRED FROM THE SUPERIOR COURT OF THE COUNTY OF HUMBOLDT, STATE OF CALIFORNIA.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Amended Complaint.

Now comes plaintiff in the above-entitled cause, by permission of this Court first had and obtained, files this his Amended Complaint, and for cause of action alleges:

I.

That the said defendant, The Metropolitan Redwood Lumber Company, is now, and at all times

hereafter mentioned has been, a corporation duly formed, organized and existing under and by virtue of the laws of the State of Michigan, and has its principal place of business in the city of Eureka, County of Humboldt, State of California.

II.

That on or about the 15th day of August, 1910, and for a long time prior thereto, the defendant conducted logging operations on lands near Howe Creek in said County of Humboldt, State of California; that said logging operations consisted in cutting down or felling redwood and fir trees, converting the same into sawlogs and hauling or dragging said sawlogs, by means of a wire cable attached to a steam engine, otherwise known as a Compound Yarder Donkey, [23] to a landing from which said sawlogs were transported by a railroad to a sawmill to be manufactured into lumber. That said cable was about one and one-quarter inches in diameter, and used for the purpose of hauling or dragging one sawlog at a time over and along the road or dragway to the said landing, a distance of about four hundred yards. That said road or dragway conformed to the lay of the land and has two straight courses, to wit, the said road or dragway ran in a straight course from said landing, a distance of about three hundred feet, and then turned at a right angle pursuing said last course to the point where the logs were hauled from; that at the point or angle on said road or dragway where said two straight courses meet, there was placed a "Tommy Moore" fastened to a large stump by means of a wire rope called a

"Tommy Moore strap"; that said "Tommy Moore" consists of a large iron or steel block containing a swivel and weighing about 600 pounds. That said "Tommy Moore" was so placed for the purpose of keeping said cable in position, and was at all the times herein mentioned, used for that purpose. That said cable passed through the said "Tommy Moore" around the swivel therein contained, and was thereby held in proper position. That said "Tommy Moore strap" consisted of a wire rope about one inch in diameter, and about 30 feet in length, the two ends of said wire rope being fastened to the "Tommy Moore" and the loop of said wire rope was placed over and around a redwood stump located on the side of said road or dragway opposite the point thereon where said "Tommy Moore" was placed as aforesaid.

III.

That on or about the month of May, 1910, plaintiff was employed by defendant as a "chaser" on said road or dragway, and that plaintiff's duties under such employment were to take charge of said "Tommy Moore"; to tend said cable and signal to the engineer who had charge of the said Compound Yard Donkey when to stop and when to [24] start said engine, while said sawlog was being hauled or dragged over and along said road or dragway to the said landing. That in the performance of said duties, the plaintiff was compelled to stand near the said stump, around which the said "strap" was fastened as aforesaid, in order to tend said "Tommy Moore" and said cable and to give the said signal

to the said engineer; that in order to give the said signals as aforesaid, it was necessary for the plaintiff to stand in a position in plain sight of the engineer, and at a point on or near said road or dragway where plaintiff could have a plain view of both of said courses of said road or dragway.

IV.

That the said "Tommy Moore strap" was so carelessly and negligently made and constructed by the said defendant, that the said "Tommy Moore strap" at the time the plaintiff was injured by the breaking of said "Tommy Moore strap" as hereafter alleged was dangerous to use and operate in holding and keeping said "Tommy Moore" in place, and in that behalf plaintiff alleges that said defendant carelessly and negligently made and constructed said "Tommy Moore strap" out of an old, rusty, badly worn cable, about one inch in diameter, that did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said sawlogs were being hauled or dragged as aforesaid.

V.

That common ordinary care and reasonable care and prudence required and demanded that said "Tommy Moore strap" should be made and constructed of wire rope having sufficient tensile strength to hold said "Tommy Moore" in place and withstand the strain thereon while said sawlog was being hauled or dragged along said road or dragway as aforesaid.

VI.

That said defendant carelessly and negligently

failed and [25] neglected to provide and maintain a safe and suitable "Tommy Moore strap" as aforesaid, and on the 15th day of August, 1910, and at all times herein mentioned, said "Tommy Moore strap" was in an unsafe, dangerous and defective condition.

VII.

That said defendant so carelessly and negligently made, constructed, kept and maintained said "Tommy Moore strap" as aforesaid that the same was, on the 15th day of August, 1910, and for a long time prior thereto, in an unsafe, defective and dangerous condition, in this that the said "Tommy Moore strap" was made out of an old, badly worn, weak, rusty cable about one inch in diameter, that did not have or possess sufficient tensile strength to withstand the strain thereon, when said "Tommy Moore" was being used as aforesaid, and had no means of protection to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said "Tommy Moore strap" should give way or break.

VIII.

That said "Tommy Moore strap" was, on the 15th day of August, 1910, and for a long time prior thereto had been, in the aforesaid defective, dangerous and unsafe condition. That the defendant knew of the said unsuitable, defective, dangerous and unsafe condition of said "Tommy Moore strap" as aforesaid, or might have known of the same by the exercise of ordinary care and diligence; but the said defendant carelessly and negligently permitted and

suffered the same to remain in said unsuitable, defective, dangerous and unsafe condition and provided and maintained the same in said unsuitable, defective, dangerous and unsafe condition for the use as aforesaid, on said 15th day of August, 1910, and during all the times herein mentioned. That on the said 15th day of August, 1910, and while said "Tommy Moore strap" was in said unsafe, dangerous and defective condition [26] the plaintiff was engaged in performing the duties for which he was employed as aforesaid, and while so engaged and while working within about 20 feet of said "Tommy Moore," the said "Tommy Moore strap" broke by reason of the said unsafe, dangerous and defective condition thereof, and struck plaintiff on the right hip and leg, thereby crushing and breaking the bones of said hip and leg and cutting, lacerating, bruising and injuring said hip and leg.

IX.

That at the time of receiving said injury and prior thereto, said plaintiff was an able-bodied man, sound in limb and in good health, capable of doing manual labor in any capacity, and earning an income from said labor averaging eighty dollars per month; and by reason of said injury as aforesaid, plaintiff is permanently prevented from following his usual vocation and his earning capacity has been greatly reduced.

X.

That by reason of said injury aforesaid, plaintiff's right hip and leg have become greatly impaired and injured, and as plaintiff is informed and believes,

and therefore states the fact to be, that by reason of said injury the said hip and leg will always be weak and impaired, and that said leg, by reason of said injury, is now, and always will be, about two inches shorter than it was before said injury as aforesaid, and plaintiff will always be and remain a cripple by reason of said injury.

XI.

That as a result of said injury, which plaintiff hereby alleges to be permanent, plaintiff has suffered and now suffers great mental and physical pain and agony; and is now and will be for the remainder of his life greatly incapacitated from earning a livelihood, his right hip and leg permanently injured and weakened to his damage in the sum of Twenty-five Thousand Dollars. [27]

WHEREFORE, plaintiff demands judgment against defendant for the sum of Twenty-five Thousand Dollars, and for costs of suit herein expended.

PUTER & QUINN,
Attorneys for Plaintiff.

State of California,
County of Humboldt,—ss.

Hugh Davis, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing Amended Complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HUGH DAVIS.

Subscribed and sworn to before me this 8th day of December, 1911.

Y. F. PUTER,
Notary Public in and for the County of Humboldt, State of California.

Due service of the within Amended Complaint is hereby admitted this 8th day of December, 1911.

O. C. GREGOR and
MAHAN & MAHAN,
Attorneys for Plaintiff.

[Endorsed]: Filed December 11, 1911. Southard Hoffman, Clerk. [28]

In the District Court of the United States, Ninth Circuit, Northern District of California, 2d Division.

TRANSFERRED FROM THE SUPERIOR COURT OF THE COUNTY OF HUMBOLDT, STATE OF CALIFORNIA.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Demurrer to Amended Complaint.

Now comes the defendant above named and files this its Demurrer to the Amended Complaint of plaintiff herein, and for grounds of Demurrer allege:

That said complaint does not state facts sufficient

to constitute a cause of action.

That the alleged cause of action set forth in said Amended Complaint is barred by the provisions of Subdivision 3 of Section 340 of the Code of Civil Procedure of the State of California.

WHEREFORE defendant prays to be hence dismissed with its costs herein expended.

MAHAN & MAHAN,
OTTO C. GREGOR,
LILIENTHAL, McKINSTRY and RAYMOND,
Attorneys for Defendant.

Service of the within admitted this 8th day of January, 1912.

PUTER & QUINN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 10, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

At a stated term, to wit, the November term, A. D. 1911, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 19th day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, designated to hold and holding this court.

No. 15,390.

HUGH DAVIS,

vs.

METROPOLITAN REDWOOD LUMBER CO.

Order Overruling Demurrer to Amended Complaint.

Upon motion of counsel for plaintiff, and it appearing that the attorneys for the defendant do not object thereto, it is ordered that the defendant's demurrer to amended complaint be and the same is hereby overruled, with leave to defendant to answer within 20 days. [30]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

TRANSFERRED FROM THE SUPERIOR COURT OF THE COUNTY OF HUMBOLDT, STATE OF CALIFORNIA.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Answer to Amended Complaint.

Now comes the above-named defendant, and for its Answer to the Amended Complaint of plaintiff on file herein,

Denies, that the "Tommy Moore strap" mentioned in the said Amended Complaint consisted of a wire

rope about one inch in diameter, and avers that said "Tommy Moore strap" was 1¼ inches in diameter, and denies that said "Tommy Moore strap" was so or otherwise carelessly or negligently made or constructed by said defendant, or that said "Tommy Moore strap" at the time plaintiff was injured, or at any other time or at all, was dangerous to use or operate in holding or keeping said "Tommy Moore" in place or otherwise, or that said defendant carelessly or negligently made or constructed said "Tommy Moore strap" out of an old, rusty or badly worn cable about one inch in diameter, or that said "Tommy Moore strap" did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said sawlogs were being hauled or dragged as alleged, and in this behalf avers, that said "Tommy Moore strap" was about 1¼ inches in diameter, well fitted and adapted for the purpose for which the same was used, and that defendant used ordinary and reasonable care in the selection of the same. [31]

Denies that said defendant carelessly or negligently failed or neglected to provide or maintain a safe and suitable "Tommy Moore strap" as aforesaid, or that on the 15th day of August, 1910, or at any other time or at all, said "Tommy Moore strap" was in an unsafe, dangerous or defective condition.

And denies that said defendant so or otherwise carelessly or negligently made, constructed, kept or maintained said "Tommy Moore strap" as aforesaid, that the same was on the 15th day of August, 1910, or for a long time prior thereto, or at any time

or at all, in an unsafe, defective or dangerous condition in this, that the said "Tommy Moore strap" was made out of an old, badly worn, weak or rusty cable, about one inch in diameter, or did not have or possess sufficient tensile strength to with stand the strain thereon when said "Tommy Moore" was being used as aforesaid, or at any other time, or otherwise, or at all, or that reasonable or ordinary care required defendant to furnish means of protection, to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said "Tommy Moore strap" should give way or break.

And denies that said "Tommy Moore strap" was, on the 15th day of August, 1910, or for a long time prior thereto, or for any time at all, had been in the aforesaid or other defective, dangerous or unsafe condition, or that the defendant knew of the alleged unsuitable, defective, dangerous or unsafe condition of said "Tommy Moore strap" aforesaid, or otherwise or at all, or might or could have known of the same by the exercise of ordinary care and diligence.

And denies that said defendant carelessly or negligently permitted or suffered the said "Tommy Moore strap" to remain in said or any unsuitable, defective, dangerous or unsafe condition, or provided or maintained the same in said or any unsuitable, defective, dangerous or unsafe condition for the use as aforesaid on the 15th [32] day of August, 1910, or at any time mentioned in said Amended Complaint, or at all.

That as to the allegations following, to wit:

> "That on the said 15th day of August, 1910, and while said 'Tommy Moore strap' was in said unsafe, dangerous and defective condition, the plaintiff was engaged in performing the duties for which he was employed as aforesaid, and while so engaged and while working within about 20 feet of said 'Tommy Moore,' the said 'Tommy Moore strap' broke by reason of the said unsafe, dangerous and defective condition thereof, and struck plaintiff on the right hip and leg, thereby crushing and breaking the bones of said hip and leg and cutting, lacerating, bruising and injuring said hip and leg,"

defendant has no information or belief on the subject of said allegation, and placing its denial upon that ground, denies that on the said 15th day of August, 1910, or while said "Tommy Moore strap" was in said or any unsafe, dangerous or defective condition, the plaintiff was engaged in performing the duties for which he was employed as aforesaid, or while so engaged or while working within about twenty feet of said "Tommy Moore" the said "Tommy Moore strap" broke by reason of the said or any unsafe, dangerous or defective condition thereof, or struck plaintiff on the right hip or leg, thereby crushing or breaking the bones of said hip or leg, or cutting, lacerating, bruising or injuring said hip or leg.

That as to allegation in paragraph numbered "IX" in said Amended Complaint, defendant has no information or belief sufficient to enable it to answer said allegation, and basing its denial upon that

ground, denies that at the time of receiving said injuries, or prior thereto, plaintiff was an able-bodied man, sound in limb or in good health, or capable of doing manual labor in every capacity, or earning an income from said labor averaging $80.00 per month, or that [33] by reason of said or any injury as aforesaid, or otherwise, plaintiff is permanently prevented from following his usual vocation or his earning capacity has been greatly reduced.

That as to allegation in paragraph numbered "X" of said Amended Complaint, defendant has no information or belief upon the subject of said allegation sufficient to enable it to answer the same, and basing its denial upon that ground denies that by reason of said or any injury aforesaid, plaintiff's right hip or leg had become greatly impaired or injured, or that by reason of said or any injury the said hip or leg will always be weak or impaired, or that said leg, by reason of said or any injury, is now or always will be about two inches shorter than it was before said or any injury as aforesaid, or shorter at all, or that plaintiff will always be or remain a cripple by reason of said injury or otherwise.

And denies that as a result of said injury or otherwise, plaintiff is now, or will be for the remainder of his life, greatly incapacitated from earning a livelihood, or his right hip or leg permanently injured or weakened, to his damage in the sum of Twenty-five Thousand Dollars, or in any sum whatever.

And defendant denies that in the performance of the duty or duties of plaintiff, plaintiff was compelled to stand near the said stump around which the

said strap was fastened as aforesaid, in order to tend said "Tommy Moore" or said cable, or to give the said or any signal to the said engineer, and denies that in order to give the said or any signal as aforesaid, or otherwise, it was necessary for plaintiff to stand in a position in plain sight of the said engineer or at a point on or near said road or dragway where plaintiff could have a plain view of both of said crosses of said road or dragway.

And defendant, for a further and separate answer and defense herein, avers that the injury alleged to have been suffered by [34] plaintiff were the result of the risks of the business in which said plaintiff was engaged at the time he suffered the injuries complained of.

And for a further and separate answer and defense herein the defendant avers that the injuries alleged to have been suffered by plaintiff were the result of plaintiff's own carelessness and negligence.

And for a further and separate answer and defense herein, defendant alleges, upon information and belief, that the injuries alleged to have been suffered by plaintiff were occasioned and caused by the negligence and carelessness of a fellow-servant of said plaintiff, then in the employ of the defendant and engaged in the same general business and particular occupation as and with said plaintiff.

And for a further and separate answer and defense herein, defendant alleges that the negligence and carelessness of the said plaintiff directly contributed to and were the approximate causes of the said injuries alleged to have been suffered by plain-

tiff, in that and because the said plaintiff before and upon the 15th day of August, 1910, well knew and was thoroughly familiar with the kind and character of the work at which he was then employed, and well knew the acts and duties he was required to perform under the terms of his said employment, and well knew and was thoroughly familiar with the danger of receiving injury while in the position and place he was in at the time of said injury, and well knew that said place was a dangerous place for him to be in, but that said plaintiff so negligently and carelessly conducted himself in and about and concerning his said employment, and in and about and concerning the means and method of performing or attempting to perform the same, that he received the injuries complained of, and in behalf of this defendant avers, that had said plaintiff used ordinary care and caution in the [35] performance of his duties and had he used ordinary care and caution in protecting and looking after his own safety, he would not have received or suffered the or any injuries complained of in said Amended Complaint.

WHEREFORE, defendant having fully answered plaintiff's Amended Complaint, prays to be hence dismissed with its costs herein expended.

MAHAN & MAHAN,
OTTO C. GREGOR,
LILIENTHAL McKINSTRY and RAYMOND,
Attorneys for Defendant.

State of California,
County of Humboldt,—ss.

Thomas G. Atkinson, being first duly sworn, deposes and says that he is President of the Metropolitan Redwood Lumber Company, a corporation, the defendant named in the above-entitled action, that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

THOMAS G. ATKINSON.

Subscribed and sworn to before me this 16th day of March, 1912.

[Seal] L. E. MAHAN,
Notary Public in and for the County of Humboldt, State of California.

Due service of the within Answer to Amended Complaint is hereby admitted this 16th day of March, 1912, and within the time stipulated.

PUTER & QUINN,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 21, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

In the District Court of the United States for the Northern District of California.

#15,390.

HUGH DAVIS

vs.

THE METROPOLITAN REDWOOD LUMBER COMPANY.

Verdict.

We, the jury, find in favor of the plaintiff, and assess the damages in the sum of Ten Thousand Dollars ($10,000).

A. W. ERICSON,
Foreman.
AXEL SUNDQUIST.
LEWIS H. LEE.
JAS. WILSON.
ELMER L. DEVLIN.
D. W. McGOWAN.
MARTIN S. CLAUSSEN.
C. O. LINCOLN.
ABRAHAM LARSEN.
WILLIAM W. TURNER.
MURDOCK McGILVRAY.
ALBERT D. ROBERTS.

[Endorsed]: Filed July 25, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [37]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,390.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause having come on regularly for trial on the 23d day of July, 1912, being a day in the July, 1912, Term of said Court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein; Messrs. Puter & Quinn appearing at attorneys for the plaintiff, and Messrs. Mahan & Mahan and Kenneth Newett, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on the 24th and 25th days of July, all in said year and term, and evidence, oral and documentary, upon behalf of the respective parties, having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages in the sum of Ten Thousand Dollars ($10,000). A. W. Ericson, Foreman; Axel

Sundquist, Lewis H. Lee, Jas. Wilson, Elmer L. Devlin, D. W. McGowan, Martin S. Clausen, C. O. Lincoln, Abraham Larsen, William W. Turner, Murdoch McGillvary, Albert D. Roberts," and the Court having ordered that judgment be entered in accordance with said verdict and for costs: [38]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Hugh Davis, plaintiff, do have and recover of and from Metropolitan Redwood Lumber Company, a corporation, defendant, the sum of Ten Thousand ($10,000) Dollars, together with his costs in this behalf expended, taxed at $———.

Judgment entered July 25, 1912.

[Seal] JAS. P. BROWN,
Clerk.
By Francis Krull,
Deputy Clerk.

A true copy attest.

JAS. P. BROWN,
Clerk.
By Francis Krull,
Deputy Clerk.

[Endorsed]: Filed July 25, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,390.

HUGH DAVIS

vs.

METROPOLITAN REDWOOD LUMBER CO. et al.

Certificate to Judgment-roll.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 25th day of July, 1912.

[Seal] JAS. P. BROWN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed July 25th, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[40]

[Notice of Bill of Exceptions.]

In the District Court of the United States, Northern District of California, Second Division.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

To the Plaintiff Above Named and to Messrs. Puter and Quinn, His Attorneys:

Defendant hereby presents the following proposed Bill of Exceptions as hereunto annexed, to be used upon a Writ of Error sued by the defendant herein to the above-entitled court from the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

OTTO C. GREGOR,
MAHAN & MAHAN,
KENNETH NEWETT, Jr., and
LILIENTHAL, McKINSTRY & RAYMOND,
Attorneys for Defendant and Plaintiff in Error.

[41]

In the District Court of the United States, Northern District of California, Second Division.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Bill of Exceptions of Defendant.

Be it remembered that the above-entitled cause came on regularly for trial before the above-entitled court, sitting at Eureka, California, on the 23d day of July, 1912, the Honorable John J. De Haven presiding as Judge thereof, and the jury duly impanelled to try the said cause, Messrs. Puter and Quinn appearing as attorneys for the plaintiff, and Messrs. Mahan and Mahan and Kenneth Newett, Jr., appearing as attorneys for the defendant, and thereon the following proceedings were had and taken on said trial:

[Testimony of W. C. Elsemore, for Plaintiff.]

W. C. ELSEMORE, sworn for plaintiff, testified on direct examination as follows:

I am a resident of the county of Humboldt, a civil engineer by profession. I have made a diagram of a portion of the territory on the south bank of the Eel River, opposite the Metropolitan Mill, which shows the location of where this alleged accident took place, which this suit is the outgrowth of. I have the diagram with me.

(Testimony of W. C. Elsemore.)

(Witness places map on blackboard, a copy of which is hereto attached as exhibit "A.")

(Witness resumes testimony:) The line on the left of the diagram, the furtherest line to the [42] left of the diagram, represents a section of the railroad running up the gulch; the yellow band represents the log road or skid road by which the logs are hauled off the hill. With reference to the yellow strip, the hill is all up to the right. This road marked "Log Road," in yellow, is thirty feet from the railroad track about the point where this stump, "Tommy Moore" stump is. The elevation of the log road at the stump is 11 1/10 feet higher than the railroad track. At the point opposite the stump marked "24.7" the elevation of the road is 12 6/10 feet. At the point opposite the stump marked "37.6" the elevation of the skid road is 37.6 feet above the railroad track. I don't know how high the stump marked "Elevation 28.6" is above the railroad track opposite it upon the left. I didn't count from that. It is 28.6 above the railroad opposite what is called the "Tommy Moore" stump. The elevation of the stump here marked "24.7," the stump on the left is 24 7/10 feet above the railroad track. The elevation of the stump marked "Elevation 15," marked "3 foot stump," is 15 feet above the railroad track opposite the "Tommy Moore" stump. The width of the skid road as I scaled it along here is about 8 feet. The diameter of the "Tommy Moore" stump is about 6 feet. The diameter of these stumps as drawn here upon the map, is in proportion to the

(Testimony of W. C. Elsemore.)

width of the road as given upon the map. I endeavored to give just the size as they appear upon the ground there. Everything is marked on the map on a scale of ten feet to the inch. The distance between the "Tommy Moore" stump and the place called the donkey site is 238 feet. The distance from the "Tommy Moore" stump to the point marked "Elevation 58.0," on the skid road up the hill is 184 feet. The distance from the "Tommy Moore" stump to the stump marked "37.6 elevation" and marked "8½ feet diameter" at a point of elevation is 99.8 feet.

On cross-examination the witness testified: I don't know whether this absolutely correctly represents the scene of the injury in this case. I know nothing about that. I was [43] taken by Mr. Puter to this place and asked to make certain measurements in directions which were pointed out. Other than that I know nothing about it. He pointed out a stump to me and told me to measure from that point to another point, pointed out those places and asked me to give elevations and so on, and I did as requested. That is all I know about this. The surface above here is in general the uneven surface that you find in the logging woods; that is to say, the elevation of this stump is fifteen feet above the railroad. I don't mean to say that that ground there is exactly fifteen feet above the railroad, some may be twelve feet, some eleven feet; this roadway running to what is called the donkey site is practically on a uniform grade from the "Tommy Moore" stump to the don-

(Testimony of W. C. Elsemore.)

key site. I will say that this old skid road that we took the measurements of along here is practically upon a uniform grade from this point marked "donkey site" to the "Tommy Moore" stump. Speaking of the country on either side of the road, the country on either side, except where it has been made into a logging road, is in an uneven condition, as it is uneven in the logging woods. There are hillocks and depressions in this country along here on each side of the road. I did not measure the distance from the stump. I did not put down the measurement of the diameter of the stump. It is eight feet or somewhere along there. These measurements of elevation were taken from the top of the stump. I have given the elevation of the ground opposite the stump, 11.1 feet, and the elevation on the stump is 14.6. I think there is three or four feet difference there between the elevation of the ground and stump marked "3 feet" on map. This does not represent the elevation of the ground at the point indicated right at the stump. There is nothing at all to indicate the height of the various stumps. The distance between the stump to which that "Tommy Moore" strap is fastened and the opposite side of the skid road is somewhere about twelve feet. [44] The side nearest the logging road to the opposite side of the logging road is about twelve feet. The land at this point begins to raise up. It is a raise to the top of the hill. I do not know what per cent grade is at that point. I did not take various positions here to see how far I could see in the direction Mr. Puter indicated that the log road

(Testimony of W. C. Elsemore.)

ran. The only position I had was on top of this stump ("Tommy Moore" stump). All these distances and elevations were taken from the top of the stump with one sitting of the instrument. I did not stand away to see how far I could see down this way. If a man was standing at the point marked with an "x," I am not able to tell how far he could see down this road. I would judge he could see around to here (shows). If you stood at a point 30 or 35 feet from the stump you could not see very far down there. I don't know just how the country lays there. I have an idea how the land is there. I don't know exactly the particular point. It was the general character of logging woods, different elevations. I did not notice any other road when we were there. I had my position all the time upon the top of the stump. That is the only skid road I noticed. I would say this was a manufactured skid road. I took an elevation 184 feet from the "Tommy Moore" stump. I stood on the stump and took the elevation, and remained there. I did not examine to see whether there were any other roads running off in various directions up the hill or down the hill.

[Testimony of Dr. W. J. Quinn, for Plaintiff.]

Dr. W. J. QUINN, sworn for plaintiff, on direct examination testified as follows:

My name is William J. Quinn. I am a physician. I have been practicing my profession since 1905, seven years; in Humboldt County six years. In my professional capacity I was called to administer to

(Testimony of Dr. W. J. Quinn.)

the plaintiff, Hugh Davis, in this action. I remember the occasion of that call. When Mr. Davis got hurt I was in the country and came in upon the train, and naturally when I got off the train and saw the ambulance [45] there I went over to see who was hurt, and I found it was Mr. Davis. So I went up right after Mr. Davis to the hospital. I went up after they took him there. I said I would be right up there at the hospital as soon as he was. It was the Union Labor Hospital. When *I about* the train, I meant the Eel River train. I saw the ambulance there and I said, "I will meet you when you get up there." I was at the hospital right after that and saw him. I made an examination of his condition. I took him in the emergency dressing-room we have there and there was a splint on him and bandages and the blood was oozing through above the bandage; and I took all those off and the bone was protruding out through the muscle and skin and everything. The bone was protruding from the lower third, I think, of the leg between the knee and ankle. It would be right here (shows), closer to the knee than the ankle, within the third; I can't remember exactly. It was above the ankle joint. There was also a fracture of the thigh about the middle third of the same leg. It was his right leg. I found a compound fracture of the leg about a quarter way above the ankle and the bone of the leg was protruding right out. You could take his foot and pull it right around upon the side the bone was sticking out. Through the flesh and muscles and everything else, and there

(Testimony of Dr. W. J. Quinn.)

was quite a lot of hemorrhage in the flesh. The muscles were lacerated and torn. I looked at it and I told Mr. Davis it might be that one of the main arteries was cut in two and he would have gangrene in part of his foot, but that did not happen. When we find a compound fracture as bad as that it is liable to occur, but it did not occur. There was a second fracture between the hip and knee, about the middle. That was not a compound fracture, but it was a pretty bad fracture. Any fracture above the knee we consider bad, because it is a fracture that is very hard to put an appliance on to keep it there. [46] The splints would necessarily hold this fracture would be opposite to this one down here, and that makes it bad. The leg was cleaned out and a moist antiseptic dressing kept upon that leg. We don't ever do very much to it other than to let those legs run for awhile, and see how much infection there was. We always figure on infection. We leave them until we get rid of the infection before we do anything with the bone. We pull the bone straight, straighten the leg, and upon the outside of the dressing we put a retention splint, you might say. Well, I worked with the case two weeks. I saw him for all of two weeks, and the first of September I left there and went east. When I came back the leg was set. During those two weeks I did nothing except the dressing was kept on there. When his temperature went down and there was no infection in it, some time in September, I think, they went to work and fixed the leg. That was September, 1910. I was with him

(Testimony of Dr. W. J. Quinn.)

two weeks, and when I came back from the east I took care of it and dressed it. I came back from the east on the 20th of October, 1910. From that time on I took care of him and dressed his injuries. He remained in the hospital up to about two months ago. During that entire period I would dress the wound every day. After I came back from the east and took care of him, it was necessary, I think, to scrape the bone three different times. I might be possibly mistaken, either three or four times, I think three. It kept running pus from both places; the break by the thigh and also down near the foot. I used anesthetics when I scraped it. He would be put under ether or chloroform. Then we would cut down to the bone and scrape off a little bit of the bone that was rough and leave it wide open and let it fill in itself. For this break above the knee, plates were used to assist the bone so it would knit naturally. I did not see those plates put on, but I took them out. Of those that I took out, they were put on the side; here we had a piece of flat steel about six or [47] seven inches long, and probably a third of an inch wide, and there was six or eight screw holes and we put a screw right through that, and we took a drill like you would drill in to a board, and drilled down in the bone a ways and then got that in proper place and screwed the screws right down through it in that way. There was one plate put on up there and then a staple, that is driven in. It is very sharp, you know, put it on the bone and took a hammer and drove it in. He has got a leg that will be pretty

(Testimony of Dr. W. J. Quinn.)

useful to him, but still he will always be lame; that is sure. It is shorter. I have not measured it; I should say about three inches. These wounds have practically healed up. What little comes there I don't think there is any injury to him. Lots of times in a bone fracture you expect a little oozing of pus every once in awhile. There is a place on his leg now that we will have to skin graft before it will heal up. It is a space as big as a dollar, that the skin has never grown over. The knee is stiff. This wound above the knee has not thoroughly healed over yet. At times it breaks out again. Well, of course, it is lots better now than it has ever been. It is still in a condition where it is not healed up; it might be and it might not. It might not break out again and it might.

[Testimony of Hugh Davis, in His Own Behalf.]

HUGH DAVIS, sworn for plaintiff, on direct examination testified as follows:

I am the plaintiff in this action. I was born in Ireland. I am about twenty-seven years old. I came to this country in January, 1905. In 1910 I went to work for the defendant, the first of April. I went out a swamper, at two dollars a day. I worked at that four days. Then I was moved up into the rigging, and I was pulling rigging there for about a month, and he paid me two dollars and a half a day. Then they started up logging and he sent me up as chaser. He told me to go up chasing with McArthur. Mr. Spain told me to. He was the foreman in the woods for the defendant company. That is not the

(Testimony of Hugh Davis.)

same gulch that [48] I was injured on; that was another place. I put in the month of April for two dollars and a half; then he raised my wages the next month, and I worked up there until the last days of July. I went to work over in the place where I was hurt. The foreman, Mr. Spain, sent me up there then. He put me then to work as a chaser at the place where I was hurt. I worked there not quite two weeks before I was hurt. I was receiving three dollars a day wages. I have seen the diagram. I understand the diagram. The point down here (shows) is where the donkey was. The log is coming down this way (shows). This is the log road. It was quite steep down the dragway the logs come. Right here it was lower; it was a little lower than it was up here. It was up near that upper stump. They would haul the logs down the hill with the donkey here, and they had a big cable that ran up this way, about an inch and a quarter cable. And this is the "Tommy Moore" stump here where this block was hung on to. This was the "Tommy Moore." The "Tommy Moore" was located about the middle of the skid road, not quite the middle but very near it, very near one side of the skid road on the side nearest the stump, the road the logs had to come down. I had to stand about here (shows). I had to stand ten or twelve feet from the stump. My duty was to watch the log as it came as far as here (shows), about one hundred and twenty feet from the stump. I never measured it, but it was about that. When the log came down to here about one hundred and

(Testimony of Hugh Davis.)

twenty feet from the stump then I had to take care of it, stand about twelve feet from the "Tommy Moore" and be in sight so I could signal the engineer and at the same time see the log and see the engineer at the same time. As the log came along down to where the "Tommy Moore" was, I had them slack the line about three or four feet and unhook this block and hooked it on the side, and that would bring it to the landing here. My main duty was to give signals. I had them let the line out and I put it on the log here, up this way [49] (shows), and at the same time see the donkey engineer down here. If I stood further away than twelve feet, I could not see the log and the engineer, because there was an elevation coming up here, there was a big stump here. Right here (shows). That stump is marked there. There was a big hill, pretty high, you could not see anything up there. In other words, I could not see from the skid road coming down the hill, upon this road, the landing side at all. There was a big hill. It was a sort of gulch or slight depression where the skid road came down the hill. If I stood away further than twelve feet I could not see the log; I might as well not be there at all. I could see the engineer at the same time. There was no other place where I could have stood and have seen the log and the engineer and performed my duties than the place where I did stand. You could not see it any other place. This stump was in the way here, and the hill, and the elevation was going up like that. If I stood here at any place, the hill was up here, and there was a

(Testimony of Hugh Davis.)

deep hole here, a gulch that water ran into. I never measured the landing here above the railroad track and landing, but it ought to be fourteen or fifteen feet high. There was a gulch in here between the track and the log road, between the track and the elevation where the roadbed was.

Q. Were you told to go by Mr. Spain and where to work?

A. Yes, sir; I was told by Mr. Spain that I belonged here at this place.

Q. Do you remember the incident of his telling you that? A. Yes, sir.

Q. Go on and state just what he told you.

Mr. NEWETT.—That is objected to as incompetent, irrelevant and immaterial, and not proper under the issues raised by the complaint.

The COURT.—I think I will allow that question. [50]

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 1.

A. He told me one day—the log came down—when it got as far as here of course that log got foul. There was those stumps there, and I went up to change the choker, sometimes the log will go over and I have got to change the choker up there. I went to change it and the rest of the bunch on top of the hill halloed if I was alive yet. They kept halloing, those boys, that I had made half a day's delay; what was the matter. So the engineer got the signal from them and he went ahead with the log and he pulled it

(Testimony of Hugh Davis.)

right into the "Tommy Moore" and upset the "Tommy Moore," and it delayed us all of fifteen minutes or so getting out of that. I went down after this log and Spain was down there and he said, "What is the matter? Don't you know that the engineer could not see that log? That is what you are there for. I sent you here and here you belong."

Q. What did he mean by that?

A. He told me to stand there and watch the log. When the log came to this spot here where I had to change it, to give him the signal to stop, because the engineer could not see unless I gave him the signal.

Q. He told you—that was before the accident, of course? A. Yes, sir.

Q. He told you that was the place for you to stand where you could see the log and give the signal?

A. Yes, sir; see the log and give the signal to the engineer at the same time.

Mr. NEWETT.—I move to strike the answer to that last question out, upon the same grounds that I objected to the last question.

The COURT.—I will deny the motion.

To which ruling defendant then and there duly excepted. [51]

DEFENDANT'S EXCEPTION NO. 2.

(Witness resumes:) At the time of the accident I was standing here about twelve feet from the stump watching my certain portion that I had to take care of, because the log had to get about one hundred and twenty feet from me first. My work was one hundred and twenty feet from the stump, up this way.

(Testimony of Hugh Davis.)

Then men that were further up the hill who had charge of the log above my section could signal to the engineer to start or stop. From where they were, they could signal by a wire and whistle. They had a wire that ran up to them, and when the log got out of their section, that is over the elevation at this point where the upper stump was, then it got into my section. They could not see the log. From there on I took care of it. At the time the accident took place, I was standing twelve feet from the stump watching on my portion whenever the log would come along, to be right there. I could not see the log in their part, but I had to watch all the time after it came in to my part to see that it would not get unhooked or anything, and if it did get unhooked to hook it again. When this accident happened, the log was not in my section. I was watching for it to come in to my section. Then the strap broke. The strap that was around the stump, the "Tommy Moore" strap on this side, and it threw it around and hit my leg while standing off about twelve feet away. I was taken from there. I was packed from there down to the landing when they came down from the hill. I was sent in upon the train to the hospital. The other doctors up there they chloroformed me right up there and washed the blood out and sent me right on the train to the hospital. It was the 15th day of August, 1910, that I went to the hospital. I was in the hospital from the 15th day of August, 1910, until about eleven weeks ago, I think; somewhere around there. I came out about eleven weeks ago.

(Testimony of Hugh Davis.)

I was there in the hospital [52] for over a year and a half. I was six times under chloroform in the hospital, and one time out at the camp. The last time I was put under chloroform in reference to my leg was about five months ago or six months ago. That leg is shorter than the other leg. It is more than three inches shorter, anyway, maybe more. I don't know how much it is shorter. That leg is shorter than the other. I can't walk straight. If I take this shoe off you can see it. I took this heel clean off this shoe, and raised the heel to that high level, and I had to fill it up on the inside, or I could not walk at all. I have not the use of my knee. That is all that I can bend it (showing). The knee is stiff. The break up there (thigh) is not completely healed over yet. It breaks out there every four or five or six weeks; then it runs about two or three weeks, and then I don't have it for four or five weeks. Before I met with the accident this leg was sound. It was always a sound leg. I was in perfect health. I was receiving three dollars a day for the work I was doing. (Plaintiff exhibited the leg to the jury.)

On cross-examination the witness testified: It was the end of the cable that struck me. After it hit me I was conscious. If I had been standing fifteen feet away, I don't know if it would have struck me. It was the end of the line that struck me. It broke on the opposite side and swung around. It was the end of it hit me, but I don't know how near it was to the end of the line. It was something like two feet or three feet. If I stood further away than twelve

(Testimony of Hugh Davis.)

feet, I would not have been struck at all, but I could not see there. If I stood there I could not do my work.

(Plaintiff here admitted his signature to the verification of the original complaint herein and the following portion of said complaint and verification were received in evidence:)

Subscribed and sworn to before L. F. Puter, Notary Public. "That while so engaged and working within about twenty feet of said 'Tommy [53] Moore,' the said 'Tommy Moore' strap broke by reason of the said unsafe condition."

(The witness resumed:)

Q. What made you change it from about twenty feet to twelve feet in your amended complaint?

A. I could not tell the distance at that time. I got hit so badly at that time I did not know where I was standing until I went up and looked at it again. A line coming like that and knocking you out, you could not tell the spot either.

Q. When did you go out and size it up?

A. We were out there about a week ago, or maybe two weeks ago.

Q. About two weeks ago?

A. A week ago or somewhere around there, and we were out there before that.

Q. When were you out there before that?

A. That was about three weeks ago.

Q. You did say at this time you were working within twenty feet of the "Tommy Moore"?

A. About that, about that distance; I did not say

(Testimony of Hugh Davis.)

it was exactly.

Q. Well, did you know exactly where you were standing when you went out there three weeks ago?

A. Well, I had a better idea that I was standing there. I knew what I had to take care of and I knew that was the place when I went out, that was the distance I was when I went out. If a man asked you where you were hurt you would not know where you were to a minute.

(Witness resumes:) I was going downhill when they picked me up. I was knocked to a position somewhere around here (shows). The exact location was about twelve feet. It might be twelve, it might be fourteen feet, or something like that, I never measured it off to an inch. I never thought I would get hurt or anything else. I have been working [54] in the woods two or three months most every season. I worked in 1906. I think I worked about two months. In 1907 I did not work at all. In 1908 I worked from May, as near as I can tell, until August in the woods. In 1909 I worked—well, about three or four months. In 1910 I worked from April until I got hurt. All the time I had with the rigging crew was in the year of 1910 until I got hurt. That was the only year I worked with the rigging crew and the only time I worked as chaser was in 1910. The only time I worked with the rigging crew was in 1910. I started in about the first of April, 1910, with the rigging crew and worked until I got hurt. From the first of April until the 15th of August I was continually working with the rigging crew. I

(Testimony of Hugh Davis.)

was with different crews, but I continued working with the rigging crew. I was working as chaser from the first of May and until the 15th day of August I was a chaser. My duty was to watch the log through the "Tommy Moore," through the "Tommy Moore" block, and signal to the engineer, signal the engineer to go ahead as soon as I changed it over. There was no oiling to the "Tommy Moore," only what little bit the crew put on it. Anybody could do it. Sometimes I would oil it and sometimes the hook-tender, anyone that would be near it maybe once in two days. Anybody could oil it. I swore in my complaint that it was my duty to attend the "Tommy Moore." I was the oiler who oiled it. That particular strap that broke was in use, I think, about nine days, nine or ten days before the day of the accident, but we were not working more than half of the time; it wasn't more than half the time. In about fifteen days it worked eight or nine days. I don't know how many logs a day I pulled in through that "Tommy Moore." I never counted [55] them. I don't think from fifty to one hundred a day. They may have pulled in some days twenty, some days thirty, some days they would not pull in ten. According to how they got the logs. Every log that came in I went to the "Tommy Moore" and took that tag line and hooked on the choker and sent it down to the railroad cars. That happened to every log that came in while I was working there. The strap was around the stump. I was right at the stump. I saw the strap the first

(Testimony of Hugh Davis.)

day I was there. I saw the strap every day and every time a log came along, but I did not take any notice. I did not look at it to see whether it was defective. I do not know whether that strap was defective or not. I know who made that strap. Two fellows by the name of Carey and Laird. That is all the persons I know of. I did not see the strap made. I know they made it. They say they made it. They were members of the crew I was working with. I do not know what they made it out of. I don't know where they got the cable to make it. Well, it was made out of material they got from the company. It was kept there, what the company furnished and the members of the crew selected from that material and made the strap. I suppose it was under the orders of the foreman, of the hook-tender. Well, I never made any "Tommy Moore" strap. I saw it after it was made. It is a line; they took a line and put eye splices in each end and put it in there. Mr. Atkinson is the general superintendent of the company. The foreman told me to take this position. Now, he told me after I had gone down the road and at that time was attending to a foul line when he told me that I had no business there, that my business was around this side of the [56] stump. He told me that I was to be down here to give the signal; the engineer could not see me when I was up above. He said, "Why aren't you down here?" He told me my place was here. He said, "Down here you belong." That was because I had to give the signal to the engineer and watch the log

(Testimony of Hugh Davis.)

at the same time. He pointed out a position down here for me to occupy. The position where I can give the signal to the engineer whenever that log would be coming down to the "Tommy Moore." He said, "I want you down here; I want you here by the 'Tommy Moore.' You can't give the signal up there." I said, "I had to go up there to fix up the log there." He said, "You have no business on that side of the 'Tommy Moore.'" The fellows above halloed out to me what was the delay, what delayed me, and they gave the signal, and I ran on down before the log to stop it before it got to the "Tommy Moore," but the log got down ahead of me and tangled up the "Tommy Moore," and Spain said, "What is the matter here? You have to come down here. You ought to know the engineer can't see the log if you ain't down here to give the signal. Ain't that what you are here for?" He told me my place was on this side of the stump. Mr. Spain did not warn me against standing too close to that stump. He never warned me about standing too close to that stump. He did tell me my position was on this side (side towards engine). Now, on this side, occupying this position, I can see directly down to the engineer. At any point along here I can see pretty well. That is a fact, I can see at any point along here. I was out there showing them how the things were situated. I was out with Mr. Puter and Mr. Elsemore. Now, as a matter of fact, there are roads or indications of old roads running off this way,

(Testimony of Hugh Davis.)

roads running all kinds of ways. Those roads go right across bringing in trees or logs, sometimes at this point, sometimes from here, [57] and sometimes from there. There are signs of roads, quite a number of them, running all through the woods in every direction. I used one road at the time I was employed there. At the time I got hurt, that was the main line when I got hurt. There was a road came around the other way. At the time I got hurt they were logging off the hill but they had changed off that road. Of course, there was no skid road picked out for them until they picked the road themselves. They built the road themselves. There was all kinds of indications where the logs had been drawn. They only changed the line two or three times in two weeks. This line had stayed in that situation. They took the logs from up fifteen or sixteen yards both sides of that and pulled it with a line in to that certain chute, and they pulled along the chute. I was not out there for a year and a half, in that neighborhood. After I got out there I found the conditions changed. There was a good deal of growth over the road, undergrowth, and weeds grown up. They had not been using that particular logging territory for a long time. It was just the same any more than there was some brush grown up. There are roads that run in different directions from this. The old road took that course. At one time that road did go around this stump here, before they changed it to this other road. There was a road going up the side hill before that. This was the sec-

(Testimony of Hugh Davis.)

ond road. There were two roads. This one and another road. The other road was over this way. This logging road here has no certain width. There was no width; the log makes its own road and they are different widths. I had to be in that position to do my work. I took it because Spain told me to and because I had to be there anyway, for both of those reasons. If Spain had not told me to, I would have taken that position anyway. I took that position before [58] Spain told me at all. When I was with the other crew, working at the same work between April and August, I had nearly the same character of work that I did at this time. It was very near the same duty, but it was in a different position where I had to stand. I was then attending the "Tommy Moore." I was acting as chaser in that position before. That lasted for about three months. During that time the log chain was drawn through every day, thirty or forty a day. I saw the strap every day; the "Tommy Moore" strap was present in front of my eyes, and the strap that caused the injury was present in front of my eyes every day. It was there but I did not pay any particular attention to it. I didn't take any particular notice of it. I could have examined it if I wanted to. I thought there was no need of it. I had no experience in lines. I could have examined it if I wanted to; there was nothing to keep me from examining the "Tommy Moore" strap used there. I didn't know it needed examining; in the first place, I did not know anything about

(Testimony of Hugh Davis.)

it. There was no reason why I could not have examined it if I had wanted to. I did not examine it. I did not know whether it was rusty. I did not know what size it was or anything about it. I could not do my work, I could not see the engineer if I stood in the bight of the cable. It was not my place to stand there anyway. If the line would break or anything would fly I would be in danger. I don't know if the line was apt to break. It might break. I could not stand there and do my work anyway. It might not break, but it wasn't my place, I could not do my work if I stood there. I have seen the main line break out in the woods. I don't know how it came to break. It must be old or something. I don't know how it came to break. I have known of it. The line drawing in logs. The main line **[59]** broke. On this day, at the time I was hurt, the following were with me there: the hook-tender, his name was Gordon, and a fellow named Mike Carey and Mr. Laird, and the engineer, his name was Brunius, Tom Brunius. The whistle boy was up in the woods. That composed the whole crew. The hook-tender had charge of the crew. That was Gordon. He was supposed to have charge of the crew; that is what I heard everyone say. He was under Spain the foreman. I never knew of a "Tommy Moore" strap breaking before. Never knew of one. Spain never told me to keep away; he never told me any such thing.

On redirect examination the witness testified: The hook-tender, Gordon, had charge of the crew that

(Testimony of Hugh Davis.)

was working there the date of that accident. This crew consisted of the engineer, who was at the donkey, and myself and the men that were up on the hill that got out the logs, and fastened the log on to the cable. None of the other members of the crew were near that stump at that time. Their duties kept them away from that part of the road on top of the hill. The engineer was at his engine. The hook-tender is sometimes called the chain tender in the woods. He is the boss of the crew that is working with him. I never made a "Tommy Moore" strap. I never was there when this strap was made at all. I had nothing to do with the handling of it at all. I never put the "Tommy Moore" strap upon the stump. I never fixed the "Tommy Moore" strap at all. I had nothing to do with the placing of the "Tommy Moore" strap and nothing to do with this particular strap that broke.

On recross-examination the witness testified: There was another member of that immediate crew, the loader. He was there and he was loading on the landing. My duty was to attend to the "Tommy Moore." That "Tommy Moore" **[60]** consists of a block and is fastened to this stump through which the main cable runs.

On further redirect examination the witness testified: My duties were not confined to this "Tommy Moore"; the principal part of my duty was to signal. I was to signal to the engineer and attend to the "Tommy Moore," too.

[Testimony of Paul Laird, for Plaintiff.]

PAUL LAIRD, sworn for plaintiff, testified on direct examination: I was born in Virginia. I have been in Humboldt County off and on for about five years. I am twenty-five years old. Well, I have been in the State Engineering Department for five months. I was employed by the defendant the Metropolitan Lumber Company during the summer of 1910. I am acquainted with the defendant Mr. Davis in this action. He was employed there at that time. I remember the incident of the accident that injured Mr. Davis. At and immediately prior to that time I was choking logs. That means putting chains around the logs in the woods; getting them so they can be fastened on to the main cable. I remember the location of the "Tommy Moore" that was used at the time of this accident. I saw that strap before I had occasion to have something to do with making that strap that was used on that "Tommy Moore." I could not say exactly how long before the accident that strap was made; it had not had a great deal of use; it had been made quite a while, but it had not been used much. It was approximately two or three weeks. Two other fellows and myself made that strap. They were Mike Carey and a man by the name—I don't know exactly what his name was, but we called him Romeo. The hook-tender instructed us to make that strap. **[61]**

Mr. PUTER.—What was his name?

Mr. NEWETT.—I object to the question and move that it be stricken out as incompetent, irrele-

(Testimony of Paul Laird.)

vant and immaterial and outside the issue.

The COURT.—I shall allow it to go.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 3.

(Witness resumed:) His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of.

Mr. NEWETT.—I move that that be stricken out on the same ground.

The COURT.—I will deny the motion.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 4.

(Witness resumes:) He pointed it out to us. He told us to cut enough out of it to make a strap for the "Tommy Moore," and showed us the cable. I and these other gentlemen cut the strap off, cut off a piece, rather, from this cable and we made the strap.

Mr. PUTER.—Will you go on and state the condition of that cable, the condition the cable was in when you made the strap out of it, the condition of the piece of cable that you made the strap of?

A. Well, it was a very poor piece of line, in my estimation.

Mr. NEWETT.—I interpose an objection to this on the same ground, incompetent, irrelevant and immaterial, and outside of the issues in this case.

The COURT.—I will overrule the objection.

(Testimony of Paul Laird.)

To which ruling defendant then and there duly excepted. **[62]**

DEFENDANT'S EXCEPTION NO. 5.

(Witness resumes:) It was worn; you could tell by looking at it even, and without handling the line any at all, you could tell it was worn; in the first place, it was small. I should not think that it was big enough to be used for a strap for a "Tommy Moore" from what I know about them. I should judge it was an inch and an eighth line in diameter, or it had been. The strands were worn. The strands would break off, when we would go to push them in through the wire, they would break; the wire strands would break and fly back when we pulled the line through. I went on and helped to splice the line, with these other two gentlemen. It showed indications of being worn out. I had much difficulty in making that splice. After we had made it we took the strap to the stump and put it on the "Tommy Moore" and put it around the stump and connected it on to the "Tommy Moore."

Mr. PUTER.—Q. After you had made this strap and before the accident, did you have any conversation with the hook-tender Mr. Gordon in reference to the strap?

Mr. NEWETT.—Objected to as incompetent, irrelevant, immaterial and hearsay.

The COURT.—Objection overruled.

To which ruling defendant then and there duly excepted.

(Testimony of Paul Laird.)

DEFENDANT'S EXCEPTION NO. 6.

A. I did.

Q. State what it was.

A. He said the line was not fit to be used as a strap; he wanted to get a piece off the new line on the donkey to make the strap out of; that is what he told me.

Q. Did he give you the reason, did he state to you why he was **[63]** not permitted to use the new line?

A. Well, this line we used was not fit to be used, he said.

Mr. NEWETT.—I object to it as incompetent, irrelevant, immaterial and hearsay.

The COURT.—Overruled.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 7.

Q. Go on and state what he said about that.

A. Well, in our conversation, whatever it was, I don't distinctly remember at present, he said he wanted to get a new piece out of the new line, but they would not stand for it; they said use the old line, the old line was good enough. He didn't say who it was.

Q. Did he tell you who said that?

Mr. NEWETT.—We object to it as incompetent, irrelevant and immaterial.

The COURT.—I will sustain the objection to that.

Mr. NEWETT.—We move that the last answer be

(Testimony of Paul Laird.)

stricken out as incompetent, immaterial, irrelevant and not responsive to the question.

Mr. PUTER.—What Mr. Gordon said?

Mr. NEWETT.—Yes.

The COURT.—I will deny the motion.

To which ruling defendant then and there duly excepted.

DEFENDANT'S EXCEPTION NO. 8.

(The witness resumed:) At the time this accident occurred I was up in the woods working. I was working up here at the upper end that day, getting the logs out. This road came down the hill at right angles on the day of the accident, as compared with the landing. In other words, **[64]** it was right straight up the hill from the stump. I do not think a person could act in the capacity the plaintiff was and stand in any other place, except at the stump. There was no other place where he could stand and see up the road, so as to see the log, and at the same time see the engineer, unless he crossed the gulch and stood on the other side of the railroad. There is a deep gulch there, some seventeen or eighteen feet deep. He could not stand anywhere around here and get close enough to see the log and the engineer. There was a back line on that stump. The back line is a small line that pulls the main line back in the woods and is held in position on top of that stump by a block. It ran through a block. When they haul the cable back in the woods, they fasten a small line on the cable to pull it back in the woods

(Testimony of Paul Laird.)

with. That small line was on top of the stump. It was not possible for a person to stand on top of the stump on account of the back line cable and the block it went through there.

On cross-examination the witness testified:

Cross-examination by L. E. MAHAN.

Gordon was the boss of the particular crew in which the plaintiff was working at that time. He had charge of the work there, and when a "Tommy Moore" strap was constructed, it was his duty to make one. He got the material from material that was around there. He was told to get this strap. I do not know except what he told me. I was not with him when he was ordered to get the "Tommy Moore" strap, but I was with him nearly every evening, or every other evening after work, and he told me. It was made after the Tacoma donkey went to work; we put the new donkey in before we went to work. It was made before it went to work. The new donkey was there. I could not say how many feet of cable there was that came with that new donkey. I don't know [65] how many feet came with it. The main line used with the donkey is the line that came with it. When they undertook to roll this new cable on the drum, it was found that it was so long that quite a bit could not be put upon the drum and had to be cut off. I don't know, but what I think about it, I think there was some line cut off, where it was I could not tell you. I know there was some line cut off. It was left in that neighborhood. That

(Testimony of Paul Laird.)

was exactly the same line that was used to draw the logs from the woods. It was the same line used on the donkey. Gordon was the boss of that crew. He was the one that directed me and the others together to make this strap, and we went to work and instead of using this piece that was cut off from the main line, he used this line I spoke of, because he was told to. He did not use a piece of the main cable. Where the line out of which the strap was made came from, I could not say; it came from a line that was around an old stump; there was about forty or fifty feet of line. It was around a stump; that is all I know. There was a cable upon a donkey known as the "half-breed" donkey. I don't know what size it was; it wasn't as big as that was upon the new donkey, but what size it was I could not say exactly. I think it was about an inch and an eighth in diameter. I know as a fact that when this line has been used to some extent, it stretches. An inch and a quarter draws into an inch and an eighth. At the time Mr. Gordon told me to cut that line, I could not say on which side of the railroad track I was standing. Previous to going to work upon the new donkey I worked upon the donkey known as the "half-breed." As near as I can remember, Gordon told us to get that old line off that stump that was behind the "half-breed" on the other side of the track and make a strap out of it. He told the chaser and I was to help him. I don't know who the chaser was; I don't know his name. I did not take the [66]

(Testimony of Paul Laird.)

strap from the coil on the "half-breed" donkey, the drum.

On redirect examination the witness testified: I had not used that line around the stump upon the donkey.

[Testimony of Michael Carey, for Plaintiff.]

MICHAEL CAREY, sworn for plaintiff and direct examination, testified:

I was born in Ireland. I have been in this country six years. I am thirty years old. I was working for the defendant the Metropolitan Lumber Company during the month of August, 1910. I remember the incident of the plaintiff Mr. Davis getting hurt there. On the day, and immediately prior to the time that he got hurt, I was on the rigging; I was choking the logs. I was working up on the hill getting the logs out, so they could be hauled to the landing. I remember the strap that held the "Tommy Moore" in position, that was being used at the time the plaintiff got hurt. I am familiar with that strap. I assisted in the making of that strap about two weeks before the accident. The chain-tender told me to make that strap. His name was Gordon. A fellow named Mr. Laird assisted in making that strap; also Romy Weldon. Mr. Gordon, the hook-tender, told me where to get the cable to make the strap. He told us to make a strap and cut that out, and showed us what piece to take. He marked off the particular piece of the cable that was to be cut. The cable we used was thrown around a stump. It was across from the landing that the

(Testimony of Michael Carey.)

plaintiff got hurt on, across the railroad. He went and showed us this piece of cable, old cable, and instructed me and the other men to go to work and make this "Tommy Moore" strap out of it, and showed us where to cut it off. I assisted in cutting the cable off and assisted in making the strap and splicing it and so on. The cable was in poor condition. The cable was worn out. We had trouble splicing [67] it. We could not pull the strands through; it was all chipped and broken off, on account of the worn condition. It was rusted out. After I made this strap I assisted in putting it around the stump and fastening it on to the "Tommy Moore." I was working with the crew up on the hill getting the logs out on that day. I helped get out the log that was on the cable when the "Tommy Moore" strap broke. I remember the incident of the strap breaking. The log at that time that was being hauled was about one hundred feet from the top. It was being pulled towards the brow of the hill. The log was upon the runway when this strap broke. I did not see anything interrupting the log or striking stumps or anything of that kind. When the strap broke there was nothing in front of the log at the time. It was in the roadbed. I am familiar with the place where Mr. Davis stood. At the time of the accident Mr. Davis could not have stood in any other place and have been able to see the log coming down the hill and at the same time see the engineer whom he was to give signals to. He could not stand in any other place except by that stump, about fifteen feet

(Testimony of Michael Carey.)

from the stump. If he went beyond that he could not see up that road. I helped get him out after he was hurt. He was on the landing at the time and we packed him down when I got down.

On cross-examination the witness testified: At the time the rope broke the log was out, I should think, between seven and eight hundred feet. There is a whistle-boy that stands at this end, and his duty is to warn the engineer at this end, and he follows it, this boy, until the cable chaser takes it. The whistle-boy follows it up to give signals. He gets signals from the men who stand between the "Tommy Moore" and the log. There are whistle-men along here. We give him signals and he gives them to the man at the station. It was his duty to take [68] the signals here and to repeat them to the engineer. The log is going along this road. Then, when it comes to the "Tommy Moore," it stops and the line is taken out of the "Tommy Moore." Then, the main line attaches on to the end of the log; and it at once swings it around until it goes a direct course for the donkey. In doing that it wears a roadway here. It will form a hard roadway. The logs will not go down directly, so this space here was all worn away by logs so that a man standing twenty feet here or thirty feet, could look a considerable distance from there. He could see probably one hundred feet or two hundred. Gordon was the foreman of that crew, and he had full charge. It was his duty to make these straps when they broke or when they were needed and he could go and take any material he

(Testimony of Michael Carey.)

could find that was sufficient for that purpose. I remember when the Tacoma donkey came there, the new Tacoma donkey. I am referring to the one that was in use at the time this injury happened. I remember when that came. That came a couple of weeks before the injury. Fourteen hundred feet of new rope or new cable came with that. I remember that when they put it on the drum they could not get it all on. Probably four or five hundred feet were cut off, because it could not be got on the drum. That remained around upon the landing. That "Tommy Moore" strap could have been made out of that if it was necessary. If Gordon had wanted to he could have made it out of that piece of new line. It was there and could have been used. I don't think the whistle-boy standing at this end could see all the way to the bottom. When the log starts in the woods the men in the woods follow it or watch it until it gets down to where somebody else takes it, to see that everything goes right and that it does not get foul; if it gets foul they go down and release it. Just as soon as it gets foul they signal to the whistle-boy. He in turn sends the word to the engineer. [69] This log had started about 100 feet when this broke. It had about five or six hundred feet to go until it reached the "Tommy Moore." I had practically started this log going in. The chasers are supposed to stand there, even when that log was six or seven hundred feet in the woods, to attend to his duties, which is when the log comes up to change it. He stays there until the log comes there to change it.

(Testimony of Michael Carey.)

When the log came to the "Tommy Moore," it was his duty to unhook the tag line and let it go outside. You can stay any place and see the engineer—that is the man he was to signal to. Perhaps he could see the tag line from anywhere in one hundred feet; he could not see this line here and the log going in to the tag line at the "Tommy Moore" any place from the landing to there, but he could not see up. He had to see up two hundred feet from the "Tommy Moore," to see if it gets foul. If it gets foul he knows it by the tension upon the line, and if the hook comes off or the choker comes off he knows it by the slacking of the line. The rest of that crew follow the log down all the time to see if anything goes wrong, and if anything goes wrong they immediately signaled the boy and he signaled the engineer to stop. You can follow the log all the time until the other man can take it up with his eye. The line was running through the "Tommy Moore" block. The log had to go through there. If he saw the log approaching the "Tommy Moore," the engineer would stop it instantly as soon as he gave the signal. If he stood back here forty feet and saw when the log got to the "Tommy Moore," he could not see far enough. He could see the "Tommy Moore" forty feet away from it. When he stood forty feet from the stump there was a big pitch to come over there within one hundred feet of him. I never stood there to look to see how far I could see. I could stand here and see that stump. I could not stand here and see that stump. I never tried. He [70] could not stand here

(Testimony of Michael Carey.)

(showing); that is the only place to be, by the "Tommy Moore." He could not see his work anywhere else. His work was to attend to the "Tommy Moore." He could see the "Tommy Moore" any place from the landing to that stump. He could see to do his duty any place from the landing to that stump, but he could not see any further up. He had to see up two hundred feet or three hundred feet. We had to look out for ourselves above here.

On redirect examination the witness testified: In reference to the point that I worked at in the woods, the position I had, I could see the log a certain ways upon its course to the bottom here, to the "Tommy Moore" here, then the log passes out of my sight; then the person at the "Tommy Moore" had to look after it from the time it came into view of the man at the "Tommy Moore." I did not make any measurements of how far that would be when it got out of view. I could not see the whole way to the "Tommy Moore." He could not stand forty feet away and see 200 feet up the road.

[Testimony of Tom Breunius, for Plaintiff.]

TOM BREUNIUS, sworn for plaintiff testified on direct examination:

My name is Tom Breunius. I reside at Stitz Creek, Scotia, Humboldt County. I have been in this country going on three years now. I am an engineer. I was in the employ of the Metropolitan Redwood Lumber Company during the month of August, 1910. I was donkey-driver. I was a mem-

(Testimony of Tom Breunius.)

ber of the crew of which Mr. Davis was one. Mr. Spain was foreman of that crew at that time. A man by the name of Gordon had charge of that crew there. He was the hook-tender. I remember the occasion of the injury to Mr. Davis. I was working there that day. Now, this diagram represents, this yellow line represents the roadway or landing, and this point here is where the donkey was. This is the railroad. This represents the stump where the "Tommy Moore" was fastened. I had been working a couple of weeks, not over that, with that engine before the accident. We were pulling; as far as I know [71] the diagram is right, almost at right angles, what they call a square pull. This point right across the roadway from the stump is quite a steep precipice. This roadway turned up between the runway coming down here and the runway coming down to the landing. This part was almost level (shows); this part was quite a grade (shows). I could not see across there from these two places at all. You would have to be very close to that stump in order to be able to look up the driveway and at the same time to be able to see me. He would have to be within twelve or fourteen feet of the stump, something like that, in order to look up to see the log as it was coming, as it came over the first declivity that brought the log in sight of the chaser. He had to be where he could watch it all the time. There was no other wire and no way of signaling me except to do it at that point. He naturally had to be there. The cable that was then being used upon the day of

(Testimony of Tom Breunius.)

the accident was practically a new cable, an inch and a quarter in diameter. I was not there when they put it on, but you could see and I know it was a brand new cable, just as good as a brand new cable. It had never been used before, that is the main line, the line they haul the logs in with. It was a good inch and a quarter cable. The engine figured about eighty horse-power. The gearings increased the horse-power. It was what they call a compound gear machine. Now, the horse-power of that engine is thirty-three thousand pounds, lifted a foot in a minute. The cylinder capacity of the engine would figure out eighty horse-power and it was sixteen to one. I never stopped to figure out exactly what strain the engine could put upon the cable. In plain English it was a very powerful engine. It would break one of those cables at times, and according to the wire companies that manufacture that kind of cable, they claim that cable will stand about seventy-two tons strain. The comparative strain on the cable fastening the "Tommy Moore" to that stump on the day of the accident, taking into consideration the right angled haul or pull, is considered twice the purchase [72] on one single wire of that strap as upon the main line. But, of course, the strap being doubled, we have two parts, therefore on one part of the strap there would be the same strain as upon the main line. In other words, if the strap was of the same size and the same tensile strength as the main line, one way doubled around that stump would offset the power of the main line. In other words, the

(Testimony of Tom Breunius.)

two strands there—provided it had the same tensile strength, if it had no inequality of binding where it could throw the power more on one strand than the other. The reason for that difference was the angle pulling through the block, through this big block. I remember the incident of the breaking of the strap. At that time we were hauling logs. It was a brand new machine and it had not been working very extra good, one part of it, but this particular day it was doing all right. It was giving a pretty fair pull then, although nowhere near what it ought to have done. When this accident happened it was an ordinary pull. The log did not run against anything, that is what they told me. We were pulling ordinarily when that gave away. Mr. Davis' duty was as the log approached this "Tommy Moore," what we call the lead, you know, of course, the log would not go through that; the cable runs through this block. The log would not go through that, so they had to stop and unhook and hook it on the other side to bring the log in. It was part of his duty to keep track of the log after it came in his vision along this road, and he had charge of it from that time. That is about a hundred and forty or a hundred and fifty feet until it got to the donkey. His position was to stay where he could see the log coming down the hill and at the same time see me at my position here. He could not stand very far away and see the log coming down. He might possibly have gone down upon the railroad track and seen, but it was too far away; that location is there on this side. He could hardly

(Testimony of Tom Breunius.)

see up from down there, I don't think. He could not [73] be on top of the stump, either. There was a block on top of the stump. That is where the back line was. He had to be within twelve or fourteen feet of that stump, anyway, to do his work as chaser. A platform might have been built out towards the railroad track and run back there, and he could have been in a safer position that way. But there was no platform built there and this was eleven or twelve feet higher; the railroad track is down eleven or twelve feet lower than the roadbed at that point.

On cross-examination by Mr. NEWETT, the witness testified:

Well, we all know what the duties of a man taking that position is. Gordon was the hook-tender, what we called the boss. He was the boss over me.

[Testimony of Hugh Davis in His Own Behalf (Recalled).]

HUGH DAVIS, recalled for plaintiff, testified on direct examination:

All this occurred in this county and State.

(It is admitted that the defendant is a corporation.)

Thereupon plaintiff rested.

Defendant thereupon made a motion for a nonsuit.

Mr. NEWETT.—At this time I desire to move for a nonsuit in this case upon the ground that the evidence is not sufficient to justify a verdict in behalf of the plaintiff under the pleadings in this case. And I desire to call the Court's attention to what I deem

to be a fatal variance between the pleadings and the proof, if that is shown; for the further reason, that under the law the plaintiff assumes the risks of his employment and the injury occurred by reason of one of the assumed risks, and that he is guilty of contributory negligence; and that the injury was occasioned by the act of a fellow-servant of the plaintiff for which the defendant was not responsible.

Said motion for a nonsuit was denied by the Court, to which said ruling defendant duly excepted. [74]

DEFENDANT'S EXCEPTION NUMBER 9.

[Testimony of James Spain, for Defendant.]

JAMES SPAIN was thereupon sworn for defendant, and on direct examination testified:

I am at present the woods foreman of the Metropolitan Redwood Lumber Company, in this county. I have held that position three years, a little over. I have followed the logging and lumbering business for thirty-nine years. I have had thirty-nine years' experience. I was the foreman of the Metropolitan Redwood Lumber Company on August 15th, 1910, at the time of this injury. I was not present at the time of this injury. I was up at the other landing there, the other donkey, in another portion of the woods. I know the particular place where the accident occurred. I am familiar with it. Mr. Davis was a member of Red Gordon's crew. Tom Breunius was the engineer, Mike Carey was a rigging-man and Paul Laird, a rigging-man, were members of that crew at that time, and a fellow we called Texas Jack was sniper. Mike Kindergan was upon

(Testimony of James Spain.)

the landing, loading. Billy Jenetti was the whistle-boy. I remember the occasion of them going over to this particular place to work. I instructed them to go over there. I instructed Red Gordon. I told him to go ahead and make a road and pull logs. That means go over there and make his donkey site and get his road ready; there was grading to do upon the road there, get his strap ready and hang out his blocks and this "Tommy Moore" and stretch his line. They had been working previous to these instructions to go over on the other side with what we called the "half-breed" donkey. That donkey was located just across the track in reference to this location. They used the new donkey in the new place. Fourteen hundred feet of line, inch and a quarter main line, came with the new donkey, and there was also a back line. That back line is a small cable that pulls the big line back into the woods with afterwards. This fourteen hundred feet of line was available for [75] their use in fixing up that place. There was other line there available for their use, two thousand feet of inch and a quarter line across the track on the other donkey, probably seventy-five or eighty feet distant from the place where they were working. I remember of them getting ready and putting the new line upon the donkey. There was too much of it—more than the drum hold. They cut off a piece, two hundred or two hundred and fifty feet. That laid alongside the donkey. That line was available for any purpose they wished to use it for there. It was available for "Tommy

(Testimony of James Spain.)

Moore'' straps if they desired to use it. The two thousand feet on the other drum, on the other donkey across the road was available. The hook-tender, Gordon, has charge of the selection of the rope that was used for any purpose by the crew. Most anyone of the crew can make the ''Tommy Moore'' straps. All the rigging crew actually do make them, that is, including Gordon and those under him. I remember prior to this accident of having a conversation with Mr. Davis in regard to where to stand at this particular ''Tommy Moore.'' It was a few days before the accident. I know it was a few days, because the accident happened a few days afterward. That conversation was as follows: Well, I was going down the track and he was leaning up on the stump that the ''Tommy Moore'' was on. I told him he had better get away from there, that was too close to the ''Tommy.'' He remarked that he could not see any place else. I walked up to him and walked down a little further past the stump where I saw there was a good place, and I told him, here was a good place to stand, he could see just as good as right there at the stump. When I came along down the track Mr. Davis was leaning on this stump, and I took him along here down towards the donkey, about thirty-five or forty feet down the grade. I took him down as far as he could get a view by that stump. Since that time I have gone upon the ground and got into the position where I was then [76] where I could see this road right up close by this stump. I have measured it. It is thirty-eight feet. If he had

(Testimony of James Spain.)

been standing where I showed him, he could not have been caught by this "Tommy Moore" strap because the strap was not long enough. By the breaking of the strap and its going around the stump it would not reach that far. I don't remember any conversation with Mr. Davis at one time when the log became foul with the "Tommy Moore" and I told him that his place was there on this side. I might have, but I don't remember it. It is a fact that his duties were on this side. His duty was when the log came there to unhook the choker and pass it through the "Tommy Moore" and then hook the cable on so it would come in. Before the log approached sufficiently to allow the tag line to pass through the "Tommy Moore" he was to signal the engineer to stop; then to unhook the choker or the tag line and pass it through the "Tommy"; then it was pulled on in, as the log went in. He followed it in to the donkey, unhitched the choker and sent it back to the woods. When I put him in this position by this stump, I came down here far enough so I could see by this stump. This is the stump (showing). It was the nearest stump from there. There was a deep hole by the landing. I took him down here so he could get a view here and see the log projecting in here (shows). I have never given the hook-tender or crew any instructions regarding what rope shall be used in their work. The hook-tender has the discretion in the selection of any rope used by them. In this particular instance, Red Gordon was the hook-tender. Red Gordon had the selection of any

(Testimony of James Spain.)

rope or cable that was used on these operations. From the place that I stationed Mr. Davis by looking through here, he could not only see the log approaching the "Tommy Moore," but he could see over here and see it coming down the hill. He could see up on the side of the hill there. That was talked over with him at the time. Yes, sir, he could see just as well up the [77] sidehill there as he could at the stump. I have investigated to see whether or not you could see the "Tommy Moore" in the position in which it was from any place along from the landing to there (shows) and you can see it any place. (Photograph shown witness.) This is a photograph of that place viewed from where the "Tommy Moore" was standing. The view was taken in this position over here (shows), a side view of this operation. The point on that photograph of the "Tommy Moore" stump is marked "A." The stump from which I took a view when I stationed Mr. Davis is marked "B." The road or driveway came right down this way (shows) from the "Tommy Moore" stump to the landing. That line (showing) represents the dragway, from the "Tommy Moore" stump to the landing. That is down from the "Tommy Moore" stump to the landing. The dragway is immediately behind that line, that depression. This stump (showing stump on plat south of the dragway beyond the "Tommy Moore" stump) is marked "C." When they were making this line out, this road was graded up somewhat along here. The dirt was thrown towards the railroad track immediately

(Testimony of James Spain.)

opposite and to the west of the dragway. The dirt was thrown out there. There was a reddish streak along made by the dirt thrown out.

(There was then received in evidence the photograph above referred to.) On this photograph the "Tommy Moore" stump is marked "A," this stump "B" and this is "C." The landing is not shown in the picture. It was down here (shows), and marked "I." It was in that direction. (Photograph shown to the jury.) I stationed Mr. Davis right here (shows) with reference to the photograph, as far down here as you see by that stump, at the place marked "X." The strap that went around that stump was twenty-five or thirty feet long. These straps would have different lengths depending upon the location of the stump to the roadway. That is the reason the workmen had to make them themselves. They have to make a new "Tommy Moore" strap for each new direction in which they draw the logs, that is, unless it was a [78] straight pull, or unless a former strap would answer the purpose. It is made with two eye splices in it, one on each end, one eye splice on each end, and as the crew are directed to go, or as they go to different logging operations, they themselves have to make a strap for each new situation.

On cross-examination the witness testified:

I have worked three years here for the company, the present owners of the Metropolitan Redwood Lumber Company. I worked for them six or seven years before I came here. This "Tommy Moore,"

(Testimony of James Spain.)

I should think, weighs six or seven hundred pounds. That "Tommy Moore" was held three feet and a half or four feet in suspension from the stump known as the "Tommy Moore" stump. This yellow line upon the map represents the dragway where it comes down here around this turn. This is the stump here, the strap from the "Tommy Moore" went around the stump. The "Tommy Moore" was suspended nearer to the side of the dragway. It was what I call at the side of the dragway, about four feet or four and one-half feet from the stump. I never measured the "Tommy Moore" strap. I did see that strap there before the accident, though I did not examine it. Practically all the stumps are about six or seven or eight feet, some of them not so high from the ground, on this map cut. That "Tommy Moore" stump on the upper side next to the "Tommy" was probably four feet high. It was a little higher than the "Tommy Moore" stump. I never took any notice of the upper side of that stump. I have been at the lower side of it, but I never took any notice of the upper side of it. It would not be over a couple of feet higher. The top of this stump from these figures is twelve feet higher than the center dragway. That is about right. This driveway from where the donkey stood up to the "Tommy Moore" stump was not quite upon a level. It was downhill from the stump to where the donkey stood. In other words, this portion commencing right at the stump here the grade gradually [79] went down and it was lower, considerably lower, than

(Testimony of James Spain.)

when you get down to the landing. The crew up in the woods when they got the log out, they had their whistle-tender there and that whistle-tender gave signals, all necessary signals as the log progressed within his vision. While the log was in his vision he gave signals with his whistle. It was Davis' duty to give signals in reference to the log after the log had passed out of the whistle-tender up here. After it went in sight of the "Tommy Moore" it was Davis'. From that time on until the log got down to the "Tommy Moore" it was Davis' duty to signal if necessary. The whistle-boy signals until it gets out of his vision. When the log came down this roadway until it went over the brow of the hill the whistle-boy did the signaling. After he went over the brow of the hill and within the vision of Davis, it was Davis' duty to give the signal. Somewhere along there, somewhere over one hundred feet it came in sight of Davis and from that time on it was in his charge. Then, when the log got down to the "Tommy Moore," then it was Davis' duty also to make the necessary changes there for the swinging, so that the log could go on its way to the landing. I saw that "Tommy Moore" strap several times before it broke. I remember of being up at this location a few weeks ago with a party of gentlemen, in which I pointed out where you told Davis to go at this particular time. Mr. Kindergan was present at that time. I don't remember of stating at that time that you had previous to the accident told Mr. Davis to stand ten or twelve feet away from that stump or

(Testimony of James Spain.)

fourteen feet, or thirteen feet. I did not state that that day. I pointed out where, to those men, at that time. I walked right up with them at the time I spoke to Mr. Davis. I did not examine the cable any. I knew that cable was made out of a main line. I knew it was made out of rusty cable. Any cable will be rusty if it has laid there a night or two. I don't mean to say it was a new cable at all. I did not know that that strap was [80] made out of that old, discarded cable. I did not know what cable that strap was made out of. I did not know it was not made out of new cable. I knew there was good cable there. The skid road don't run down here to the railroad track. It is run upon a level or slight incline from the "Tommy Moore" stump down to the landing. These grasses are on the side of the driveway next to the railroad track. In other words, it is just back of the grasses; the picture introduced in evidence is taken in front and shows a lot of grass, etc., in front of the roadway. There is no little hill right a short distance from the "Tommy Moore" stump to the landing as pointed out upon the photograph. The hill is here from the center of the road opposite the "Tommy Moore" stump, from there to the landing, the road was upon a regular grade. That line was not put in there to indicate the roadway, but to indicate in a general way where the roadway was. The roadway up to here, as far as this photograph is concerned, runs on the right-hand side of the stump marked "C." This stump marked "B" upon the photograph is represented here upon the

(Testimony of James Spain.)

map (showing). Now, the roadway ran up on the other side of that stump. In other words, it ran upon the other side of the stump marked "C" in the photograph. This is the stump "B" in the photograph (shows). Now, the roadway, of course, runs up on the left-hand side of that stump, looking from the donkey engine to the "Tommy Moore." Here is "B"; now, the roadway runs between "B" and the "Tommy Moore" stump and runs around here. In other words, it runs up that way. The new cable, this inch and a quarter cable, when it was delivered there at the landing, was to be used for the making of "Tommy Moore" straps or any other purpose that was required. The big cable was purchased and shipped up there for the purpose of being used as a drag cable, not for "Tommy Moore" straps or anything of that kind. We got a new donkey and the donkey was put together there. Just before they commenced to go to work on that side of the gulch. It was a big, powerful donkey, and this new cable was to be used as a drag cable on [81] that donkey. There were other cables there which could be used for straps and things of that kind. The logs that were hauled by this cable were large redwood logs running from two feet in diameter and ran up as high as six or seven feet, it might be eight feet, some of them. When this "Tommy Moore" was placed there in position, and held in position by this "Tommy Moore" strap, it was placed there for the purpose of remaining there as long as they hauled down that way to the landing. It was a permanent

(Testimony of James Spain.)

contrivance to remain there as long as they used the road hauling logs down there to that landing, and the "Tommy Moore" did remain there during the time they used that landing and were hauling logs down by it. I don't remember an incident that sometime prior to the accident, of a log being entangled in the "Tommy Moore," and Mr. Davis was not present to give the signal to the engineer, and he was further up the dragway and that I reprimanded him and told him in substance that his place was down there near the stump where he could see the engineer so as to give him the proper signals. I don't remember. I may have done it.

On redirect examination, the witness testified:

In fact, his duties were on this side of the "Tommy Moore," where he could see the engineer and log approaching. It is not a steep grade. It is about the same grade as the railroad runs down here, the same incline from the "Tommy Moore" to the landing. There were two thousand feet of inch and a quarter line immediately across the track available for "Tommy Moore" straps if they saw fit to use that. They had authority to go there and use any portion of that line for that purpose. No instruction was ever given by me to any of the men there not to use that for that purpose. The inch and a quarter line upon the other donkey, the "half-breed," was a good line. It was three or four months old. It was put on there about the first of May.

(Testimony of James Spain.)

On recross-examination the witness testified: [82]

The two thousand foot cable that was across the gulch was used about three or four months. The new cable of which I have been speaking that was put in use and was in use at the time of the accident lasted, I guess, about a year, anyway. We used it all that season and it was upon the drum in the spring. That cable and one across the gulch were both of the same size, an inch and a quarter. I don't know whether the strap that is in question here, whether that strap was actually made before or after the two hundred and fifty feet was cut off that new cable. The new cable was cut off before the donkey went to work, when the donkey was running enough to put it on. The cable was upon a big spool. Then the donkey was set upon the landing, put up. It was brought there apart and it was put up and afterwards it was run.

On redirect examination the witness testified:

The line was cut, the two hundred and fifty feet were cut off that main line before any log was hauled, or any lines were used that they lay out.

Thereupon defendant rested.

Thereupon defendant made a motion for a nonsuit.

Mr. NEWETT.—Now, all the evidence has been introduced and I make a motion for a nonsuit in this case upon the grounds that the evidence is not sufficient to justify a recovery under the pleadings, and I assign in particular that there is a variance between the allegations and the proof; that no re-

covery can be had for any alleged cause set forth in the amendment of the year 1907 to section 1970 of the Civil Code of this State. That, under the circumstances of the case, the evidence shows that the plaintiff was injured by the ordinary risks of the business which he had assumed.

2d. That he was guilty of contributory negligence.

3d. That any injury caused to him was caused by the negligence of a fellow-servant or fellow-servants, employed by the said [83] defendant in the same general business.

I don't know whether your Honor desires any further argument.

The Court thereupon denied said motion, and defendant duly excepted to said ruling of the Court.

DEFENDANT'S EXCEPTION NO. 10.

Thereupon counsel proceeded to argue the case before the jury.

The Court thereupon instructed the jury as follows, to the giving of each and every one of such instructions, where herein noted, defendant excepted:

Instructions.

The COURT.—Gentlemen of the Jury:

1. The plaintiff seeks in this action to recover damages from defendant by reason of certain injuries alleged to have been suffered by him, and which it is charged were occasioned by the negligence of the defendant. The particular charge is that the defendant carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore" strap, and on the 15th day of

August, 1910, the said "Tommy Moore" strap was in an unsafe and defective condition; that it was unsafe, defective and dangerous in this, that said strap was made out of an old, badly worn, weak and rusty cable and did not possess sufficient tensile strength to withstand the strain that was placed upon it.

DEFENDANT'S EXCEPTION NO. 11.

2. Now, the burden of proof is upon the plaintiff to sustain these allegations. He must sustain them by a preponderance of the evidence, and before you would be warranted in returning a verdict for the plaintiff you must be satisfied that the injury sustained by plaintiff was by reason of having in use a defective strap, one that was not reasonably safe for use.

DEFENDANT'S EXCEPTION NO. 12.

3. You are instructed, gentlemen, that you are the exclusive [84] judges of the creditability of the witnesses, and of the weight to be attached to the testimony of each and all of them.

DEFENDANT'S EXCEPTION NO. 13.

4. You are not bound to believe anything to be a fact because a witness has stated it to be so, or to take the testimony of any witness as absolutely true, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken as to the matters testified to by him, or that for any reason his testimony is untrue or unreliable. The substance of that instruction is simply, gentlemen, that you should believe those witnesses whom you do believe, and act upon their testimony;

the testimony that you do not believe you will reject from your consideration.

DEFENDANT'S EXCEPTION NO. 14.

5. I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employee is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they had been so furnished and provided, and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care.

DEFENDANT'S EXCEPTION NO. 15. [85]

6. An employee is not bound to know or inquire whether the machinery, or appliances or structure furnished him by the master are unsafe or unsound, because there is an implied undertaking upon the part of the employer that all that can be reasonably done by the exercise of ordinary care has been done

to render the machinery, appliances or structures reasonably safe. The employee has a right to rely upon his employer's care and judgment in the matter of providing reasonably safe machinery, appliances or structures, and may rightfully assume that the employer has exercised ordinary care in these respects, and that such machinery, appliances or structures furnished by the employer to be used by him in the business are reasonably safe and secure, unless he knows to the contrary. Of course, if by working with them his attention is called to the fact that it is unsafe and dangerous, then, as a matter of course, he is required to act upon that knowledge.

DEFENDANT'S EXCEPTION NO. 16.

7. I instruct you that if you find from a preponderance of the evidence that at the time the plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable "Tommy Moore" strap, and that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said "Tommy Moore" strap, if such condition you find existed, then unless plaintiff through negligence contributed to such injury, your verdict must be for the plaintiff.

DEFENDANT'S EXCEPTION NO. 17.

8. You are instructed that the burden of proof rests upon defendant to establish by a preponder-

ance of the evidence the facts [86] necessary to constitute the defense of assumption of risk, which the defendant alleged as a defense in the action.

DEFENDANT'S EXCEPTION NO. 18.

9. I instruct you that the burden of proof rests upon the defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of contributory negligence which is alleged by the defendant as a defense.

DEFENDANT'S EXCEPTION NO. 19.

10. Of course, a person employed to do work assumes the ordinary risks of such employment, and you are charged that the ordinary risks of the business in which one is employed are such as the employee is as likely to know as the master. They are such risks as can be reasonably foreseen and which are the natural and ordinary incidents of the work that the employee agrees to do, and which are liable to happen in the performance of such, although the employer discharges his duty and exercises due care.

DEFENDANT'S EXCEPTION NO. 20.

11. The rule that the servant takes the ordinary risks of the business presupposes that the master will perform the duty of caution and care which the law casts upon him. It is those risks alone which cannot be obviated by the use of ordinary care by the master, that the servant assumes.

DEFENDANT'S EXCEPTION NO. 21.

12. A person who enters the service of another assumes all the ordinary risk incident to the employment in which he is engaged. While this is the

law upon this subject, it is qualified by the rule that the employer is charged in the law with the duty of not subjecting his employee to risks by his own negligence.

DEFENDANT'S EXCEPTION NO. 22.

13. Under this rule the employer is required to use ordinary [87] care, not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence directly or proximately causes injury to the employee, he is responsible to the person injured thereby, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which the employee was engaged, were unsafe or unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continued in the use thereof.

DEFENDANT'S EXCEPTION NO. 23.

14. You are further instructed that knowledge by an employee injured of the defective or unsafe condition or character of any machinery, ways, appliances or structures of such employer, shall not be a bar to a recovery for any injury caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter con-

sented to use the same or continued in the use thereof.

DEFENDANT'S EXCEPTION NO. 24.

15. You are charged that should you find from the evidence that the injuries complained of by the plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 25.

16. In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into [88] consideration all of the facts and circumstances of the case, and if from the consideration of all the other facts and circumstances, you find that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injury complained of, then I charge you that plaintiff was guilty of contributory negligence and cannot recover in this action, and you must return a verdict in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 26.

17. In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover all damages shown by the evidence which he has suffered up to the time of the trial, which were proximately caused by said injury whether they could have been anticipated or not, and all damages which it is reasonably probable that he will sustain in the future by reason of the said injury not exceeding the amount demanded in the complaint.

In estimating the compensatory damages in cases of this character, all the proximate consequences of the injury shown by the evidence, future as well as past, are to be taken into consideration, including the bodily pain which resulted from the injury, the impairment of physical powers, the impairment of the plaintiff's power to labor and earn his living, and he should be awarded, if entitled to a verdict at all, sufficient to compensate him for all the proximate detriment shown by the evidence, past and prospective.

These are intended to include and embrace indemnity for loss of power or loss of capability to perform ordinary labor, or the capacity to earn money, and reasonable satisfaction for loss of physical power as shown by the evidence, always keeping in mind the fact that the plaintiff is not entitled to recover what is known as exemplary damages; simply damages which in your judgment would reasonably [89] compensate him for the injuries he has sustained, if this defendant is liable therefor. The elements of damage are in their very nature not susceptible of a precise or exact compensation, and the determination of the amount is committed to the sound judgment and good sense of the jury, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for the detriment proximately caused by such injury, and shown by the evidence, not exceeding the amount claimed in the complaint.

DEFENDANT'S EXCEPTION NO. 27.

I instruct you that negligence is a relative term,

and is defined to be, the omission to do something that a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but always relates to some circumstance of time, place or persons. Its application depends upon the situation of the parties, and the degree of care and vigilance that the circumstances reasonably impose. The degree is not the same in all cases, but varies according to the danger involved in the want of care and caution.

You are instructed that the term "contributory negligence" is defined in law as follows: Contributory negligence in its legal signification is such an act or omission upon the part of a person injured as amounts to a want of ordinary care, and which concurring or co-operating with the negligent act of another person is the proximate cause or causes of the injury complained of.

I charge you that should you believe from the evidence that at the time he was injured plaintiff had placed himself in a position near the appliance known as the "Tommy Moore," and should you further find that he placed himself in such position voluntarily and not in the discharge of his duties, and should you find that an ordinarily [90] prudent and careful man would not, under the same circumstances, have placed himself in such position, and that such position was a dangerous one, and plaintiff fully understood, comprehended and appreciated the danger of occupying such position, and that by reason of being in such position, plaintiff was struck

and injured, then I instruct you that plaintiff is not entitled to recover and your verdict should be in favor of the defendant.

You are charged that should you find from the evidence that the plaintiff when injured was in an improper place, and one not required, or intended or designed to be so used in performance of the duties for which he was hired, and in a position in which it *was customary* nor necessary nor proper for a man to occupy, and that the plaintiff had taken such position voluntarily and without authority, knowledge or acquiescence of the defendant, and that prior to the injury he had been warned and cautioned of the danger of such position by James Spain, the woods foreman, and that he was injured wholly in consequence of having taken such a position, then I instruct you that under such circumstances he cannot recover in this action, and your verdict should be for the defendant.

You are charged that an employer is not required to supply the best, newest or safest appliances to secure the safety of his employees, nor is he bound to insure the safety of the place or the appliances he furnishes. His duty in this respect is discharged when he has exercised ordinary care to furnish a place and appliances reasonably safe and suitable for the use of his employee. Thus in this case it is the duty of the defendant to furnish a "Tommy Moore" strap which in the judgment of a reasonable and prudent man would be reasonably safe and suitable for the work that it would be called upon to do. If, therefore, you find from the evidence that the defendant exercised ordinary care in furnishing a rea-

sonably safe and suitable "Tommy Moore" strap, then I instruct you that said defendant has performed [91] its full duty in that respect, even if you further find that said strap was not the best, newest or safest strap.

I am requested to give you this instruction, which I do. You are the exclusive judges of the creditability of each and every witness who has testified in your hearing; it is for you to say from your observation of the testimony given by the witness, of his manner of testifying, of his demeanor when upon the witness stand, of his interest, if any, in the present action, whether or not he speaks the truth. In passing upon the weight to be given the testimony of any witness who has testified in your hearing, it is your duty to consider—

1st. What knowledge has the witness relative to the facts concerning which he testifies?

2d. Does he narrate truthfully those facts?

3d. Is his interest in the case such as would lead him to state that which is not true, or would lead him to color his testimony?

4th. Is the memory of the witness sufficiently accurate to warrant you in believing that he can accurately remember the facts to which he testifies?

5th. Has the witness at other times made a statement at variance with his present testimony; and,

Lastly. In weighing the testimony of a witness it is your duty to weigh it in accordance with your ordinary experience of the acts and conduct of mankind generally; in other words, in determining the truth from the evidence, your ordinary experience

in the daily affairs of life must guide you in so determining.

It is admitted in the pleadings that at all times mentioned in the complaint the Metropolitan Redwood Company defendant was, and is now, a corporation duly organized under the laws of the State of Michigan and having its principal place of business in the City of Eureka. A corporation is defined to you to be a creature of the law [92] having certain powers and duties of a natural person, and continuing its existence for such length of time as the law prescribes. In this connection you are instructed that while a corporation is a creature of the law, it is none the less simply a collection of individuals doing business in their collective capacity by means of the legal entity called a corporation.

A corporation is regarded in law as having the same rights as a natural person, and when sued is entitled to the same protection as would be accorded to a natural person. In the present case, therefore, you must accord to the Metropolitan Redwood Lumber Company the same protection in its property rights that you would give to an individual similarly situated. The fact that it is a corporation must not in any manner weigh with or influence you in your deliberations in the present case.

DEFENDANT'S EXCEPTION NO. 27.

18. In addition to these instructions, I will give you the following: An employer is not bound to indemnify his employee for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the

negligence of another person employed by the same employer in the same general business, provided, nevertheless, an employer shall be liable for such injury when the same results from the wrongful act or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured.

DEFENDANT'S EXCEPTION NO. 28.

19. The evidence in this case shows without any conflict, that if there was any negligence in the construction or use of this "Tommy Moore" strap, that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible.

DEFENDANT'S EXCEPTION NO. 29. [93]

Counsel for defendant thereupon duly requested the Court to give each and every of the following instructions to the jury, but the Court refused to give and did not give to the jury any of said instructions, and to which said refusal to give said instructions and each thereof, defendant duly excepted:

1. In the present case plaintiff seeks to recover damages against defendant by reason of certain injuries alleged to have been suffered by plaintiff, and which it is alleged were occasioned by the negligence of defendant.

DEFENDANT'S EXCEPTION NO. 30.

2. I charge you that in a civil action such as the present one, the burden of proof is on the plaintiff, and further, that in this action, in order to recover, the plaintiff is compelled to prove each and every

material allegation in his complaint by a preponderance of evidence, and if you find that plaintiff has failed so to do, you, the jury must find in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 31.

3. I charge you that in passing upon the evidence adduced by the plaintiff, nothing is to be assumed or taken for granted in plaintiff's favor; that is to say, the law requires that plaintiff must prove his case to the satisfaction of the jury, by a preponderance of the testimony. If then you should find that the plaintiff has failed to prove any material allegation of his complaint by a preponderance of the testimony to your satisfaction, or if you should find that the testimony is equally balanced upon any particular fact essential to plaintiff's case, or if you should find that the weight of the testimony is against the truth of such allegation or fact, then plaintiff has failed to prove such allegation or fact, in the manner the law requires.

DEFENDANT'S EXCEPTION NO. 32. [94]

4. I instruct you that by the term "risks of the business" are meant such risks as the employee is as likely to know as the master, and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work, or which are liable to happen from the negligence or carelessness of a fellow-employee engaged in the same general business. In connection with the foregoing I instruct you that a servant entering into employment assumes the ordinary risks incident to such employment, and

among such risks and as a part of the same the employee assumes the danger of injury arising from working in a dangerous place, where the danger incident to working in such place is fully known, comprehended and appreciated by the servant, and further such servant also assumes the danger of receiving injury from the negligence of a fellow-servant or workman engaged in the same occupation or business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or unless the employer has neglected to use ordinary care in the selection of the culpable employee.

If, therefore, you find from the evidence that the plaintiff received the injuries complained of while in the employ of defendant and that such injuries were occasioned by the happening of an event which was one of the risks of the business in which said plaintiff was engaged, then I charge you that plaintiff is not entitled to recover in this action, and your verdict must be in favor of defendant.

DEFENDANT'S EXCEPTION NO. 33.

5. I charge you that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of defendant. In passing upon the question as to [95] whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of

all the facts and circumstances of the case you find from the evidence that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injuries complained of, then I charge you that plaintiff was guilty of negligence, and cannot recover in this action, and you must return a verdict in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 34.

6. I charge you that if the injury to plaintiff complained of was not the natural or probable or proximate consequence of the negligent act of the defendant, there can be no recovery in this action.

If, therefore, you find from a preponderance of the evidence that the defendant was negligent in failing to exercise reasonable care to furnish the plaintiff with a reasonably safe "Tommy Moore strap," yet if you also find from a preponderance of the evidence that such failure to furnish said "strap" on the part of the defendant was not the natural or probable or proximate cause of the injury complained of, but that the proximate cause of the injury to plaintiff was the fact that said plaintiff voluntarily assumed a position near said strap which he knew to be dangerous, and that he fully understood, comprehended and appreciated the danger of such position, then under such circumstances your verdict must be for the defendant.

DEFENDANT'S EXCEPTION NO. 35.

7. I charge you that where a person undertakes to work in a place where conditions of danger are

liable to occur in the ordinary prosecution of the work, and he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, [96] he is deemed to assume the perils incident to the employment and can recover from the employer compensation for injuries resulting therefrom.

If, therefore, you find from the evidence that the plaintiff undertook to work for defendant at a place near the "Tommy Moore strap," and that such place was a dangerous place in the ordinary prosecution of the work, and that plaintiff at and before the time of the injury had knowledge of such dangers, or that his facilities for seeing or discovering them were just as good as those of the defendant, and that he undertook and continued until the time of the injury in the work with the knowledge or opportunity for ascertaining those dangers, then I instruct that under such circumstances, plaintiff assumed the risks of such employment and cannot recover from the defendant for injuries resulting therefrom.

DEFENDANT'S EXCEPTION NO. 36.

8. I charge you that an employee, by entering or continuing in the employment of his employer without complaint, assumes the risks and dangers of the service which he knows and fully understands, comprehends and appreciates.

If, therefore, you find from the evidence that the

plaintiff had for a period of time prior to this injury, had charge of the "Tommy Moore" and had worked on or about said "Tommy Moore strap" and had prior thereto worked in similar positions with other crews employed by the same defendant; and if you further find that from such experience the said plaintiff at the time of the injury fully understood, comprehended and appreciated the risk and danger of the service he was performing and the risk and danger of the breaking of said "Tommy Moore strap," and that said plaintiff continued in said employment up to the time of the injury without making any complaint whatever, then I instruct you that under such circumstances the said plaintiff assumed the risk and danger arising from the breaking of said "Tommy Moore **[97]** strap" and cannot recover in this action.

DEFENDANT'S EXCEPTION NO. 37.

9. I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has its reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, then, under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the em-

ployees and not that of the employers.

If, therefore, in this case you find from the evidence that the defendant did exercise ordinary care in furnishing reasonably safe and suitable material for the construction of "Tommy Moore straps" to be used by its employees in constructing such straps for use in work, the character or place which necessarily changed as the work progressed, and that certain of such employees of defendant being fellow-servants of plaintiff employed by the same defendant in the same general business, did in the course of their duty construct the "Tommy Moore strap," which broke and injured plaintiff, out of the material so furnished by defendant, and if you further find that in so constructing said strap said fellow-employees of defendant negligently selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow-servants in so negligently selecting defective material in the construction of said strap, then I charge you that under such circumstances *and* such negligence would be the negligence of fellow-servants of plaintiff, and your verdict should be for defendant. [98]

DEFENDANT'S EXCEPTION NO. 38.

10. I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work including the maintenance of the place in such reasonably safe condition, nevertheless such duty of maintenance is not so absolute as to charge the employer with liability for injuries to

employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of work are assumed by the employees there employed.

DEFENDANT'S EXCEPTION NO. 39.

11. I charge you that a lumber company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its employees no duty to adopt a different method, and it is not guilty of negligence for a failure so to do.

DEFENDANT'S EXCEPTION NO. 40.

12. I charge you that as between employer and employee the duty of so using a reasonably safe place, or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master.

If, therefore, you find from the evidence that the injury to plaintiff complained of was due wholly to the negligence of the fellow-servants of said plaintiff employed by the same defendant in the same general business, in negligently failing to conform

to an established [99] and reasonably safe method of work or in negligently operating reasonably safe machinery or in negligently using a reasonably safe place, then under such circumstances your verdict must be for the defendant.

DEFENDANT'S EXCEPTION NO. 41.

13. I instruct you as a matter of law that under the pleadings and evidence in this case, James Spain, the woods foreman, and the plaintiff were fellow-servants employed by the same employer in the same general business, and that the defendant therefore is not responsible for any negligence on the part of said James Spain, even if the evidence discloses any such negligence.

If, therefore, the injury to plaintiff complained of was due wholly to the negligence of said James Spain, your verdict must be in favor of defendant.

DEFENDANT'S EXCEPTION NO. 42.

14. I instruct you as a matter of law that under the pleadings and the evidence in this case Gordon, Laird and Carey were fellow-servants of plaintiff employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such.

DEFENDANT'S EXCEPTION NO. 43.

15. I instruct you that under all the evidence in this case your verdict must be in favor of the defendant.

DEFENDANT'S EXCEPTION NO. 44.

The cause was thereupon submitted to the jury,

which retired and subsequently returned with a verdict in the above-entitled cause in the following form:

"We, the jury, find in favor of the plaintiff herein and against the defendant herein, and assess the damages in the sum of Ten Thousand Dollars."

Said verdict was by the Court thereupon ordered filed and entered **[100]** and defendant thereupon duly excepted to said verdict and the entry thereof, upon the ground that said verdict was against law.

DEFENDANT'S EXCEPTION NO. 45.

Thereupon judgment was entered herein in accordance with the said verdict in favor of plaintiff and against the defendant for the sum of Ten Thousand Dollars and costs of suit, and thereupon defendant duly excepted to said judgment and the entry thereof.

DEFENDANT'S EXCEPTION NO. 46.

Specifications of Errors of Law Occurring at the Trial of the Above-entitled Action and Excepted to by the Defendant.

The defendant hereby specifies the following errors of law which occurred at the trial of said action, and were excepted to by the defendant. The Court erred at said trial in each and every of the following particulars:

1. In overruling defendant's objection to the following questions asked Hugh Davis:

Q. Were you told to go by Mr. Spain and where to work?

A. Yes, sir, I was told by Mr. Spain that I be-

longed here at this place.

Q. Do you remember the incident of his telling you that? A. Yes, sir.

Q. Go on and state just what he told you.

Excepted to as defendant's exception No. 1.

2. In denying the motion to strike out the answer of witness Davis to the question:

Q. He told you that was the place for you to stand where you could see the log and give the signal?

A. Yes, sir, see the log and give the signal to the engineer at the same time.

Excepted to as defendant's exception No. 2. [101]

3. In overruling defendant's objection to the following question asked witness Paul Laird:

WITNESS.—The hook-tender instructed us to make that strap.

Q. What was his name?

Excepted to as defendant's exception No. 3.

4. In denying defendant's motion to strike out the following answer to the above question:

A. His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of.

Excepted to as defendant's exception No. 4.

5. In overruling defendant's objection to the following question asked witness Laird:

Q. Will you go on and state the condition of that cable, the condition the cable was in when you made the strap out of it, the condition of the piece of cable that you made the strap of?

A. Well, it was a very poor piece of line in my estimation.

Excepted to as defendant's exception No. 5.

6. In overruling defendant's objection to the following question asked witness Laird:

Q. After you had made this strap and before the accident, did you have any conversation with the hook-tender, Mr. Gordon, in reference to the strap?

Excepted to as defendant's exception No. 6.

7. In overruling defendant's objection to the following question asked witness Laird:

Q. Did he give you the reason, did he state to you why he was not permitted to use the new line?

A. Well, this line we used was not fit to be used, he said. **[102]**

Excepted to as defendant's exception No. 7.

8. In denying the motion to strike out the answer of witness Laird to the question:

Q. Go on and state what he said about that.

A. Well, in our conversation, whatever it was, I don't distinctly remember at present, he said he wanted to get a new piece out of the new line, but they would not stand for it, they said use the old line, it was good enough. He didn't say who it was.

Excepted to as defendant's exception No. 8.

9. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception No. 9.

10. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception No. 10.

11. In giving to the jury over the objection of defendant, the following instructions:

"The plaintiff seeks in this action to recover

damages from defendant by reason of certain injuries alleged to have been suffered by him, and which it is charged were occasioned by the negligence of the defendant. The particular charge is that the defendant carelessly and negligently failed and neglected to provide and maintain a safe and suitable 'Tommy Moore strap,' and on the 15th day of August, 1910, the said 'Tommy Moore strap' was in an unsafe and defective condition; that it was unsafe, defective and dangerous in this, that said strap was made out of an old, badly worn, weak and rusty cable, and did not possess sufficient tensile strength to withstand the strain that was placed upon it."

Excepted to as defendant's exception No. 11.

12. In giving to the jury over the objection of defendant, the following instructions:

"Now, the burden of proof is upon the plaintiff to sustain these allegations. He must sustain them by a preponderance of the **[103]** evidence, and before you would be warranted in returning a verdict for the plaintiff you must be satisfied that the injury sustained by plaintiff was by reason of having in use a defective strap, one that was not reasonably safe for use."

Excepted to as defendant's exception No. 12.

13. In giving to the jury, over the objection of defendant, following instruction:

13. "You are instructed, gentlemen, that you are the exclusive judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them."

Excepted to as defendant's exception No. 13.

14. In giving to the jury, over the objection of defendant, the following instructions:

"You are not bound to believe anything to be a fact because a witness has stated it to be so, or to take the testimony of any witness as absolutely true, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken as to the matters testified to by him, or that for any reason his testimony is untrue or unreliable. The substance of that instruction is simply, gentlemen, that you should believe those witnesses whom you do believe, and act upon their testimony; what you do not believe you will reject from your consideration."

Excepted to as defendant's exception No. 14.

15. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employee is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they have been so furnished and provided, **[104]** and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which

he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care."

Excepted to as defendant's exception No. 15.

16. In giving to the jury, over the objection of defendant, the following instruction:

"An employee is not bound to know or inquire whether the machinery, appliances or structures furnished him by the master are unsafe or unsound, because there is an implied undertaking upon the part of the employer that all that can be reasonably done by the exercise of ordinary care has been done to render the machinery, appliances or structures reasonably safe. The employee has a right to rely upon his employer's care and judgment in the matter of providing reasonably safe machinery, appliances or structures, and may rightfully assume that the employer has exercised ordinary care in these respects and that such machinery appliances or structures furnished by the employer to be used by him in the business, are reasonably safe and secure, unless he knows to the contrary. Of course, if by working with them his attention is called to the fact that it is unsafe and dangerous, then as a matter of course he is required to act upon that knowledge."

Excepted to as defendant's exception No. 16.

17. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that if you find from a preponderance of [105] the evidence that at the time plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable 'Tommy Moore strap,' and that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said 'Tommy Moore strap,' if such condition you find existed, then unless plaintiff through negligence contributed to such injury, your verdict must be for the plaintiff."

Excepted to as defendant's exception number 17.

18. In giving to the jury, over the objection of defendant, the following instruction:

"You are instructed that the burden of proof rests upon defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of assumption of risk, which the defendant alleges as a defense in the action.

Excepted to as defendant's exception number 18.

19. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that the burden of proof rests upon the defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of contributory negligence which is alleged by the defendant as a defense."

Excepted to as defendant's exception number 19.

20. In giving to the jury, over the objection of defendant, the following instruction:

"Of course, a person employed to do work assumes the ordinary risks of such employment, and you are charged that the ordinary risk of the business in which one is employed are such as the employee is as likely to know as the master, *they risks* as can be [106] reasonably foreseen and which are the natural and ordinary incidents of the work that the employee agrees to do, and which are liable to happen in the performance of such work, although the employer discharges his duty and exercises due care."

Excepted to as defendant's exception number 20.

21. In giving to the jury, over the objection of defendant, the following instruction:

"The rule that the servant takes the ordinary risk of the business presupposes that the master will perform the duty of caution and care which the law casts upon him. It is those risks alone which cannot be obviated by the use of ordinary care by the master, that the servant assumes."

Excepted to as defendant's exception number 21.

22. In giving to the jury, over the objection of the defendant, the following instruction:

"A person who enters the service of another assumes all the ordinary risks incident to the employment in which he is engaged. While this is the law upon this subject, it is qualified by the rule that the employer is charged in law with the duty of not subjecting his employee to risks by his own negligence."

Excepted to as defendant's exception number 22.

23. In giving to the jury, over the objection of the

defendant, the following instruction:

"Under the rule the employer is required to use ordinary care, not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence directly or proximately causes injury to the employee he is responsible to the person injured, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which [107] the employee was engaged, were unsafe or unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continued in the use thereof."

Excepted to as defendant's exception number 23.

24. In giving to the jury, over the objection of the defendant, the following instruction:

"You are further instructed that knowledge by an employee injured of the defective or unsafe condition or character of any machinery, ways, appliances or structures of such employer shall not be a bar to a recovery for any injury caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof."

Excepted to as defendant's exception number 24.

25. In giving to the jury, over the defendant's objection, the following instruction:

"You are charged that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of the defendant."

Excepted to as defendant's exception number 25.

26. In giving to the jury, over the defendant's objection, the following instruction:

"In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of all the other facts and circumstances you find that the plaintiff did not act as an ordinarily prudent or careful [108] man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injury complained of, then I charge you that plaintiff was guilty of contributory negligence and cannot recover in this action, and you must return a verdict in favor of defendant."

Excepted to as defendant's exception number 26.

27. In giving to the jury, over the defendant's objection, the following instruction:

"In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover all damages shown by the evidence which he has suffered up to the time of the trial, which were proximately caused by said injury whether they could have been

anticipated or not, and all damages which it is reasonably probable that he will sustain in the future by reason of the said injury not exceeding the amount demanded in the complaint.

In estimating the compensatory damages in cases of this character, all of the proximate consequences of the injury shown by the evidence, future as well as past, are to be taken into consideration, including the bodily pain which resulted from the injury, the impairment of physical powers, the impairment of the plaintiff's power to labor and earn his living, and he should be awarded, if entitled to a verdict at all, sufficient to compensate him for all proximate detriment shown by the evidence, past and prospective.

These are intended to include and embrace indemnity for loss of power or loss of capability to perform ordinary labor, or the capacity to earn money, and reasonable satisfaction for loss of physical power if shown by the evidence, always keeping in mind the fact that the plaintiff is not entitled to recover what is known as exemplary damages; simply damages which in your judgment would reasonably compensate him for the injuries he has sustained, if this defendant is liable therefor. The elements of damage are in their very nature not susceptible [109] of any precise or exact compensation, and the determination of the amount is committed to the sound judgment and good sense of the jury, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for the detriment proximately caused by such injury, and shown by the evidence,

not exceeding the amount claimed in the complaint."

Excepted to as defendant's exception number 27.

28. In giving to the jury, over the defendant's objection, the following instruction:

"In addition to these instructions, I will give you the following: An employer is not bound to indemnify his employee for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, provided, nevertheless, an employer shall be liable for such injury when the same results from the wrongful act or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured."

Excepted to as defendant's exception number 28.

29. In giving to the jury, over the defendant's objection, the following instruction:

"The evidence in this case shows without any conflict, that if there was any negligence in the construction or use of this "Tommy Moore strap," that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible."

Excepted to as defendant's exception number 29.

30. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"In the present case plaintiff seeks to recover damages against [110] defendant by reason of certain injuries alleged to have been suffered by plaintiff,

and which it is alleged were occasioned by the negligence of defendant."

Excepted to as defendant's exception number 30.

31. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that in a civil action such as the present one, the burden of proof is on the plaintiff, and further, that in this action, in order to recover, the plaintiff is compelled to prove each and every material allegation in his complaint by a preponderance of evidence, and if you find that plaintiff has failed so to do, you the jury must find a verdict in favor of the defendant."

Excepted to as defendant's exception number 31.

32. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that in passing upon the evidence adduced by the plaintiff, nothing is to be assumed or taken for granted in plaintiff's favor; that is to say, the law requires that plaintiff must prove his case to the satisfaction of the jury, by a preponderance of the testimony. If, then, you should find that the plaintiff has failed to prove any material allegation of his complaint by a preponderance of the testimony to your satisfaction, or if you should find that the testimony is equally balanced upon any particular fact essential to plaintiff's case, or if you should find that the weight of the testimony is against the truth of such allegation or fact, then plaintiff has failed to prove such allegation or fact, in the manner the law requires."

Excepted to as defendant's exception number 32.

33. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I instruct you that by the term 'risks of the business' are meant such risks as the employee is as likely to know as the master, [111] and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work, or which are liable to happen from the negligence or carelessness of a fellow-employee engaged in the same general business. In connection with the foregoing I instruct you that a servant entering into employment assumes the ordinary risks incident to such employment, and among such risks and as part of the same the employee assumes the danger of injury arising from working in a dangerous place, where the danger incident to working in such place is fully known, comprehended and appreciated by the servant, and further, such servant also assumes the danger of receiving injury from the negligence of a fellow-servant or workman in the same occupation or business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or unless the employer has neglected to use ordinary care in the selection of the culpable employee.

If, therefore, you find from the evidence that the plaintiff received the injuries complained of while in the employ of defendant, and that such injuries were occasioned by the happening of an event which was one of the risks of the business in which said plaintiff was engaged, then I charge you that plain-

tiff is not entitled to recover in this action, and your verdict must be in favor of defendant."

Excepted to as defendant's exception number 33.

34. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of defendant. In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of [112] the case, and if from consideration of all of the facts and circumstances of the case you find from the evidence that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injuries complained of, then I charge you that plaintiff was guilty of negligence and cannot recover in this action, and you must return a verdict in favor of the defendant."

Excepted to as defendant's exception number 34.

35. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that if the injury to plaintiff complained of was not the natural or probable or proximate consequence of the negligent act of the defendant, there can be no recovery in this action.

If, therefore, you find from a preponderance of

the evidence that the defendant was negligent in failing to exercise reasonable care to furnish the plaintiff with a reasonably safe 'Tommy Moore strap,' yet if you also find from a preponderance of the evidence that such failure to furnish said 'strap' on the part of the defendant was not the natural or probable or proximate cause of the injury complained of, but that the proximate cause of the injury to plaintiff was the fact that said plaintiff voluntarily assumed a position near said strap which he knew to be dangerous, and that he fully understood, comprehended and appreciated the danger of such position, then, under such circumstances, your verdict must be for the defendant."

Excepted to as defendant's exception number 35.

36. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work, and he has knowledge of such danger, or his facilities for seeing or discovering them are just as good as those of his [113] employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is deemed to assume the perils incident to the employment, and can recover from the employer compensation for injuries resulting therefrom.

If, therefore, you find from the evidence that the plaintiff undertook to work for defendant at a place near the 'Tommy Moore strap,' and that such place

was a dangerous place in the ordinary prosecution of the work, and that plaintiff at and before the time of the injury had knowledge of such dangers, or that his facilities for seeing or discovering them were just as good as those of the defendant, and that he undertook and continued until the time of the injury in the work with the knowledge or opportunity for ascertaining those dangers, then I instruct that, under such circumstances, plaintiff assumed the risk of such employment and cannot recover from the defendant for injuries resulting therefrom."

Excepted to as defendant's exception number 36.

37. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that an employee by entering or continuing in the employment of his employer without complaint assumes the risks and dangers of the service which he knows and fully understands, comprehends and appreciates.

If, therefore, you find from the evidence that the plaintiff had, for a period of time prior to the injury, had charge of the 'Tommy Moore' and had worked on or about said 'Tommy Moore strap,' and had prior thereto worked in similar positions with other crews employed by the same defendant, and if you further find that from such experience the said plaintiff at the time of the injury fully understood, comprehended and appreciated the risk and danger of the service he was performing and the risk and danger of the breaking of said 'Tommy Moore strap,' and that said plaintiff continued in said

[114] employment up to the time of the injury without making any complaint whatever, then I instruct you that under such circumstances the said plaintiff assumed the risk and danger arising from the breaking of said 'Tommy Moore strap' and cannot recover in this action."

Excepted to as defendant's exception number 37.

38. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, then, under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the employees and not that of the employers.

If, therefore, in this case you find from the evidence that defendant did exercise ordinary care in furnishing reasonably safe and suitable material for the construction of 'Tommy Moore straps' to be used by its employees in constructing such straps for use in work the character or place of which necessarily changed as the work progressed, and that certain of such employees of defendant, being fellow-

servants of plaintiff employed by the same defendant in the same general business, did in the course of their duty construct the 'Tommy Moore strap' which broke and injured plaintiff, out of the material so furnished by defendant, and if you further find that in so constructing said strap said fellow-employees of defendant negligently [115] selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow-servants in so negligently selecting defective material in the construction of said strap, then I charge you that under such circumstances such negligence would be the negligence of fellow-servants of plaintiff and your verdict should be for defendant."

Excepted to as defendant's exception number 38.

39. In refusing to give to the jury, at the request of defendant, the requested instructions, as follows:

"I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work, including the maintenance of the place in such reasonably safe condition, nevertheless such duty of maintenance is not so absolute as to charge the employer with liability for injuries to employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of

work are assumed by the employees there employed."

Excepted to as defendant's exception number 39.

40. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that a lumber company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its employees no duty to adopt a different method, and it is not guilty of negligence for a failure so to do."

Excepted to as defendant's exception number 40.

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41. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that as between employer and employee the duty of so using a reasonably safe place, or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master.

If, therefore, you find from the evidence that the injury to plaintiff complained of was due wholly to the negligence of the fellow-servants of said plaintiff employed by the same defendant in the same general business, in negligently failing to conform to an established and reasonably safe method of work, or in negligently using a reasonably safe place, then under such circumstances your verdict must be for the defendant."

Excepted to as defendant's exception number 41.

42. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I instruct you as a matter of law that under the pleadings and the evidence in this case, James Spain, the woods foreman, and the plaintiff were fellow-servants, employed by the same employer in the same general business, and that the defendant, therefore, is not responsible for any negligence on the part of said James Spain, even if the evidence discloses any such negligence.

If, therefore, the injury to plaintiff complained of was due wholly to the negligence of said James Spain, your verdict must be in favor of defendant."

Excepted to as defendant's exception number 42.

43. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I instruct you as matter of law that under the pleadings and **[117]** the evidence in this case, Gordon, Laird and Carey were fellow-servants of plaintiff, employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such."

Excepted to as defendant's exception number 43.

44. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I instruct you that under all the evidence in this case your verdict must be in favor of the defendant."

Defendant's exception No. 44.

45. And defendant specifies that said verdict is against law in this, that said verdict should have been in favor of the defendant herein.

Excepted to as defendant's exception number 45.

45. In entering judgment herein.

Excepted to as defendant's exception number *45.*

And defendant specifies that the evidence was insufficient to justify the verdict in that it appears that none of the injuries alleged to have been suffered by plaintiff were directly or proximately or at all caused by, or resulted from, the alleged acts or omissions on the part of the defendant charged in the complaint, but that it appears on the contrary that said injuries were brought on plaintiff by his own acts, and by the acts of other persons than this defendant.

AND NOW, IN ORDER that the foregoing may appear of record, defendant presents this as its Bill of Exceptions on its appeal from the judgment herein, and asks that the same may be settled and allowed as so presented.

Dated Sept. 28, 1912.

OTTO GREGOR,
MAHAN & MAHAN,
KENNETH KNEWETT, Jr., and
LILIENTHAL, McKINSTRY & RAYMOND,
Attorneys for Defendant. [118]

The above and foregoing Bill of Exceptions may be settled and allowed.

PUTER & QUINN,
Attorneys for Plaintiff.
OTTO C. GREGOR,
MAHAN & MAHAN,
KENNETH KNEWETT, Jr.,
LILIENTHAL, McKINISTRY & RAYMOND,
Attorneys for Defendant.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing bill of Exceptions to be used upon the appeal from the judgment herein is settled and allowed.

October 15, 1912.

JOHN J. DE HAVEN,
Judge.

Proposed Bill of Exceptions was served on Sept. 28, 1912.

[Endorsed]: Filed Oct. 15, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. **[119]**

In the District Court of the United States, Northern District of California, Second Division.

AT LAW.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Now comes Metropolitan Redwood Lumber Company, a corporation, defendant herein, and says that on or about the 25th day of July, 1912, this Court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear

from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a Writ of Error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of error so complained of, and that a transcript of the record with proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order may be made fixing the amount of the security which the defendant shall give and furnish upon said Writ of Error, and that upon giving such security, all further proceedings in this Court be suspended and stayed until the termination of said Writ of Error by the United States Circuit Court of Appeals.

LILIENTHAL, McKINSTRY & RAYMOND,

Attorneys for Said Defendant.

[Endorsed]: Filed Sep. 24, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [120]

In the District Court of the United States, Northern District of California, Second Division.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Defendant Metropolitan Redwood Lumber Company, in connection with its Petition for Writ of Error herein, makes the following assignment and specifications of error, to wit:

I. The Court erred in overruling the Demurrer to plaintiff's complaint, made upon the ground that said Complaint did not state facts sufficient to constitute a cause of action against said defendant

II. The Court erred in overruling this defendant's Demurrer upon the ground that several causes of action had been improperly united in plaintiff's complaint.

III. The Court erred in permitting plaintiff to file an Amended Complaint herein.

IV. The Court erred at the trial of said action, in the following particulars, to each of which said errors defendant at said trial duly excepted:

1. In overruling defendant's objection to the following question asked witness Hugh Davis:

Q. Were you told to go by Mr. Spain and where to work?

A. Yes, sir, I was told by Mr. Spain that I belonged here at this place. [121]

Q. Do you remember the incident of his telling you that? A. Yes, sir.

Q. Go on and state just what he told you.

Excepted to as defendant's exception number 1.

2. In denying the motion to strike out the answer of witness Davis to the question:

Q. He told you that was the place for you to stand where you could see the log and give the signal?

A. Yes, sir, see the log and give the signal to the engineer at the same time.

Excepted to as defendant's exception number 2.

3. In overruling defendant's objection to the following question asked witness Paul Laird:

WITNESS.—The hook-tender instructed us to make that strap.

Q. What was his name?

Excepted to as defendant's exception number 3.

4. In denying defendant's motion to strike out the following answer to the above question:

A. His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of.

Excepted to as defendant's exception number 4.

5. In overruling defendant's objection to the following question asked witness Laird:

Q. Will you go on and state the condition of that cable, the condition the cable was in when you made the strap out of it, the condition of the piece of cable that you made the strap of?

A. Well, it was a very poor piece of line in my estimation.

Excepted to as defendant's exception number 5.

6. In overruling defendant's objection to the following [122] question asked witness Laird:

Q. After you had made this strap and before the accident, did you have any conversation with the hook-tender, Mr. Gordon, in reference to the strap?

Excepted to as defendant's exception number 6.

7. In overruling defendant's objection to the following question asked witness Laird:

Q. Did he give you the reason, did he state to you why he was not permitted to use new line?

A. Well, this line we used was not fit to be used, he said.

Excepted to as defendant's exception number 7.

8. In denying the motion to strike out the answer of witness Laird to the question:

Q. Go on and state what he said about that.

A. Well, in our conversation, whatever it was, I don't distinctly remember at present, he said he wanted to get a new piece out of the new line, but they would not stand for it, they said use the old line, the old line was good enough. He didn't say who it was.

Excepted to as defendant's exception number 8.

9. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception number 9.

10. In denying defendant's motion for a nonsuit.

Excepted to as defendant's exception number 10.

11. In giving to the jury over the objection of defendant, the following instruction:

"The plaintiff *seeks* in this action *seeks* to recover damages from defendant by reason of certain injuries alleged to have been suffered by him, and which it is charged were occasioned by the negligence of the defendant. The particular charge is that the defendant carelessly and negligently failed and neglected to provide and maintain [123] a safe and suitable 'Tommy Moore' strap, and on the 15th day of August, 1910, the said 'Tommy Moore' strap was in an unsafe and defective condition; that it was unsafe, defective and dangerous in this, that said

strap was made out of an old, badly worn, weak and rusty cable, and did not possess sufficient tensile strength to withstand the strain that was placed upon it."

Excepted to as defendant's exception number 11.

12. In giving to the jury, over the objection of defendant, the following instruction:

"Now, the burden of proof is upon the plaintiff to sustain these allegations. He must sustain them by a preponderance of the evidence, and before you would be warranted in returning a verdict for the plaintiff you must be satisfied that the injury sustained by plaintiff was by reason of having in use a defective strap, one that was not reasonably safe for use."

Excepted to as defendant's exception number 12.

13. In giving to the jury, over the objection of defendant, the following instructions:

"You are instructed, gentlemen, that you are the exclusive judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them."

Excepted to as defendant's exception number 13.

14. In giving to the jury, over the objection of defendant, the following instruction:

"You are not bound to believe anything to be a fact because a witness has stated it to be so, or to take the testimony of any witness as absolutely true, if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken as to the matters testified to by him, or that for any reason his testimony is untrue or unreliable.

The substance of that instruction [124] is simply, gentlemen, that you should believe those witnesses whom you do believe, and act upon their testimony; the testimony that you do not believe you will reject from your consideration."

Excepted to as defendant's exception number 14.

15. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employee is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they have been so furnished and provided, and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply ordinary care."

Excepted to as defendant's exception number 15.

16. In giving to the jury, over the objection of

defendant, the following instruction:

"An employee is not bound to know or inquire whether the machinery, appliances or structures furnished him by the master are unsafe or unsound, because there is an implied undertaking upon the part of the employer that all that can be reasonably done by the exercise of ordinary care has been done to render the machinery, appliances or structures reasonably safe. The employee has a right to [125] rely upon his employer's care and judgment in matter of providing reasonably safe machinery, appliances or structures, and may rightfully assume that the employer has exercised ordinary care in these respects, and that such machinery, appliances or structures furnished by the employer to be used by him in the business are reasonably safe and secure, unless he knows to the contrary. Of course, if by working with them his attention is called to the fact that it is unsafe and dangerous, then as a matter of course he is required to act upon that knowledge.

Excepted to as defendant's exception number 16.

17. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that if you find from a preponderance of the evidence that at the time the plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable 'Tommy Moore' strap, and

that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said 'Tommy Moore' strap, if such condition you find existed, then, unless plaintiff, through negligence, contributed to such injury, your verdict must be for the plaintiff."

Excepted to as defendant's exception number 17.

18. In giving to the jury, over the objection of defendant, the following instruction:

"You are instructed that the burden of proof rests upon defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of assumption of risk, which the defendant [126] alleges as a defense in the action.

Excepted to as defendant's exception No. 18.

19. In giving to the jury, over the objection of defendant, the following instruction:

"I instruct you that the burden of proof rests upon the defendant to establish by a preponderance of the evidence the facts necessary to constitute the defense of contributory negligence which is alleged by the defendant as a defense."

Excepted to as defendant's exception number 19.

20. In giving to the jury, over the objection of defendant, the following instruction:

"Of course a person employed to do work assumes the ordinary risks of such employment, and you are charged that the ordinary risks of the business in which one is employed are such as the employee is as likely to know as the master. They are such risks as can be reasonably foreseen and which are the nat-

ural and ordinary incidents of the work that the employee agrees to do, and which are liable to happen in the performance of such work, although the employer discharges his duty and exercises due care."

Excepted to as defendant's exception number 20.

21. In giving to the jury, over the objection of defendant, the following instruction:

"The rule that the servant takes the ordinary risks of the business presupposes that the master will perform the duty of caution which the law casts upon him. It is those risks alone which cannot be obviated by the use of ordinary care by the master, that the servant assumes."

Excepted to as defendant's exception number 21.

22. In giving to the jury, over the objection of the defendant, the following instruction: [127]

"A person who enters the service of another assumes all the ordinary risks incident to the employment in which he is engaged. While this is the law upon this subject, it is qualified by the rule that the employer is charged in law with the duty of not subjecting his employee to risks by his own negligence."

Excepted to as defendant's exception number 22.

23. In giving to the jury, over the objection of the defendant, the following instructions:

"Under this rule the employer is required to use ordinary care not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence di-

rectly or proximately causes injury to the employee, he is responsible to the person injured, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which the employee was engaged were unsafe or unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continued in the use thereof."

Excepted to as defendant's exception number 23.

24. In giving to the jury, over the objection of the defendant, the following instruction:

"You are further instructed that knowledge by an employee injured, of the defective or unsafe condition or character of any machinery, ways, appliances or structures of such employer, shall not be a bar to a recovery for any injury caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same [128] or continued in the use thereof."

Excepted to as defendant's exception number 24.

25. In giving to the jury, over the defendant's objection, the following instruction:

"You are charged that should you find from the evidence that the injuries complained of by the plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not en-

titled to recover in this action, and it becomes your duty to find a verdict in favor of the defendant."

Excepted to as defendant's exception number 25.

26. In giving to the jury, over the defendant's objection, the following instruction:

"In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of all the other facts and circumstances, you find that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injury complained of, then I charge you that plaintiff was guilty of contributory negligence and cannot recover in this action, and you must return a verdict in favor of the defendant."

Excepted to as defendant's exception number 26.

27. In giving to the jury, over the defendant's objection, the following instruction:

"In this action the plaintiff, if he has shown himself entitled to recover all damages shown by the evidence which he has suffered up to the time of the trial, which were proximately caused by said injury whether they could have been anticipated or not, and all damages which it is reasonably probable that he will sustain in the future by reason of the [129] said injury not exceeding the amount demanded in the complaint.

In estimating the compensatory damages in cases of this character, all of the proximate consequences

of the injury shown by the evidence, future as well as past, are to be taken into consideration, including the bodily pain which resulted from the injury, the impairment of physical powers, the impairment of the plaintiff's power to labor and earn his living, and he should be awarded, if entitled to a verdict at all, sufficient to compensate him for all proximate detriment shown by the evidence, past and prospective.

These are intended to include and embrace indemnity for loss of power or loss of capability to perform ordinary labor, or the capacity to earn money, and reasonable satisfaction for loss of physical power if shown by the evidence, always keeping in mind the fact that the plaintiff is not entitled to recover what is known as exemplary damages; simply damages which in your judgment would reasonably compensate him for the injuries he has sustained, if this defendant is liable therefor. The elements of damage are in their very nature not susceptible of any precise or exact compensation, and the determination of the amount is committed to the sound judgment and the good sense of the jury, and if you find for the plaintiff in this action, such sum should be awarded as in your best judgment will fairly and fully compensate him for the detriment proximately caused by such injury, and shown by the evidence, not exceeding the amount claimed in the complaint."

Excepted to as defendant's exception number 27.

28. In giving to the jury, over the defendant's objection, the following instruction:

"In addition to these instructions, I will give you

the following: An employer is not bound to indemnify his employees for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence [130] of another person employed by the same employer in the same general business, provided, nevertheless, an employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured."

Excepted to as defendant's exception number 28.

29. In giving to the jury, over the defendant's objection, the following instruction:

"The evidence in this case shows without any conflict, that if there was any negligence in the construction or use of this 'Tommy Moore' strap, that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible."

Excepted to as defendant's exception number 29.

30. In refusing to give to the jury at the request of defendant, the requested instruction, as follows:

"In the present case plaintiff seeks to recover damages against defendant by reason of certain injuries alleged to have been suffered by plaintiff, and which it is alleged were occasioned by the negligence of defendant."

Excepted to as defendant's exception number 30.

31. In refusing to give to the jury, at the request

of defendant, the requested instruction, as follows:

"I charge you that in a civil action such as the present one the burden of proof is on the plaintiff, and further, that in this action, in order to recover, the plaintiff is compelled to prove each and every material allegation in his complaint by a preponderance of evidence, and if you find that plaintiff has failed so to do, you the jury must find a verdict in favor of the defendant."

Excepted to as defendant's exception number 31. **[131]**

32. In refusing to give to the jury, at the request of the defendant, the requested instruction, as follows:

"I charge you that in passing upon the evidence adduced by the plaintiff nothing is to be assumed or taken for granted in plaintiff's favor; that is to say, the law requires that plaintiff must prove his case to the satisfaction of the jury, by a preponderance of the testimony. If, then, you should find that the plaintiff has failed to prove any material allegation of his complaint by a preponderance of the testimony to your satisfaction, or if you should find that the testimony is equally balanced upon any particular fact essential to plaintiff's case, or if you should find that the weight of the testimony is against the truth of such allegation or fact, then plaintiff has failed to prove such allegation or fact, in the manner the law requires."

Excepted to as defendant's exception number 32.

33. In refusing to give to the jury, at the request of defendant, the requested instruction as follows:

"I instruct you that by the term 'risks of business' are meant such risks as the employee is as likely to know as the master, and which are the natural and ordinary incidents of the work the employee agrees to do, and which are liable to happen in the performance of such work, or which are liable to happen from the negligence or carelessness of a fellow-employee engaged in the same general business. In connection with the foregoing I instruct you that a servant entering into employment assumes the ordinary risks incident to such employment, and among such risks and as part of the same the employee assumes the danger of injury arising from working in a dangerous place, where the danger incident to working in such place is fully known, comprehended and appreciated by the servant, and further, such servant also assumes the danger of receiving injury from the negligence of a fellow-servant or workman engaged in the same occupation [132] or business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee or *employee or* unless the employer has neglected to use ordinary care in the selection of the culpable employee.

If, therefore, you find from the evidence that the plaintiff received the injuries complained of while in the employ of defendant and that such injuries were occasioned by the happening of an event which was one of the risks of the business in which said plaintiff was engaged, then I charge you that plaintiff is not entitled to recover in this action, and your

verdict must be in favor of defendant.

Excepted to as defendant's exception number 33.

34. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that should you find from the evidence that the injuries complained of by plaintiff were caused or occasioned by plaintiff's own negligence or carelessness, then plaintiff is not entitled to recover in this action, and it becomes your duty to find a verdict in favor of defendant. In passing upon the question as to whether or not plaintiff was himself guilty of negligence, it is your duty to take into consideration all of the facts and circumstances of the case, and if from the consideration of all the facts and circumstances of the case, you find from the evidence that plaintiff did not act as an ordinarily prudent or careful man, situated as he was, would have acted under the same circumstances, and that by reason of so acting he received the injuries complained of, then I charge you that plaintiff was guilty of negligence, and cannot recover in this action, and you must return a verdict in favor of the defendant."

Excepted to as defendant's exception number 34.

35. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows: **[133]**

"I charge you that if the injury to the plaintiff complained of was not the natural or probable or proximate consequence of the negligent act of the defendant, there can be no recovery in this action.

If, therefore, you find from a preponderance of

the evidence that the defendant was negligent in failing to exercise reasonable care to furnish the plaintiff with a reasonably safe 'Tommy Moore strap,' yet if you also find from a preponderance of the evidence that such failure to furnish said 'strap' on the part of the defendant that was not the natural or probable or proximate cause of the injury complained of, but that the proximate cause of the injury to plaintiff was the fact that said plaintiff voluntarily assumed a position near said strap which he knew to be dangerous, and that he fully understood, comprehended and appreciated the danger of such position, then, under such circumstances, your verdict must be for the defendant."

Excepted to as defendant's exception number 35.

36. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that where a person undertakes to work in a place where conditions or danger are liable to occur in the ordinary prosecution of the work, and he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is deemed to assume the perils incident to the employment and can recover from the employer compensation for injuries resulting therefrom.

If, therefore, you find from the evidence that the plaintiff undertook to work for the defendant at a place near the 'Tommy Moore strap' and that such

place was a dangerous place in the ordinary prosecution of the work and that plaintiff at and before the time of [134] the injury had knowledge of such dangers, or that his facilities for seeing or discovering them were just as good as those of the defendant, and that he undertook and continued until the time of the injury in the work with the knowledge or opportunity for ascertaining those dangers, then I instruct that, under such circumstances, plaintiff assumed the risks of such employment and cannot recover from the defendant for injuries resulting therefrom."

Excepted to as defendant's exception number 36.

37. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that an employee by entering or continuing in the employment of his employer without complaint, assumes the risks and dangers of the service which he knows and fully understands, comprehends and appreciates.

If, therefore, you find from the evidence that the plaintiff had for a period of time prior to the injury had charge of the 'Tommy Moore' and had worked on or about said 'Tommy Moore strap' and had prior thereto worked in similar positions with other crews employed by the same defendant; and if you further find that from such experience the said plaintiff at the time of the injury fully understood, comprehended and appreciated the risk and danger of the service he was performing and the risk and danger of the breaking of said Tommy Moore strap, and that said plaintiff continued in said employment up

to the time of the injury without making any complaint whatever, then I instruct you that, under such circumstances, the said plaintiff assumed the risk and danger arising from the breaking of said Tommy Moore strap and cannot recover in this action.

Excepted to as defendant's exception number 37.

38. In refusing to give to the jury, at the request of defendant, the requested instruction as follows:

"I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has its reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for the use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, then, under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the employees and not that of the employers.

If, therefore, in this case you find from the evidence that the defendant did exercise ordinary care in furnishing reasonably [135] safe and suitable material for the construction of 'Tommy Moore strap' to be used by its employees in constructing such straps for use in work, the character or place of which necessarily changed as the work progressed, and that certain of such employees of defendant being fellow-servants of plaintiff employed by the

same defendant in the same general business, did in the course of their duty construct the 'Tommy Moore strap' which broke and injured plaintiff, out of the material furnished by defendant, and if you further find that in so constructing said strap said fellow-employees of defendant negligently selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow-servants in so negligently selecting defective material in the construction of said strap, then I charge you that, under such circumstances, such negligence would be the negligence of fellow-servants of plaintiff and your verdict should be for defendant."

Excepted to as defendant's exception number 38.

39. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work, including the maintenance of the place in such reasonably safe condition, nevertheless such duty of maintenance is not so absolute as to charge the employer with liability for injuries to employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of work are assumed by the employees there employed."

[136]

Excepted to as defendant's Exception Number 39.

40. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that a lumber company which selects a customary method of operation or construction which is neither palpably unreasonable nor clearly dangerous owes its employees no duty to adopt a different method, and it is not guilty of negligence for a failure to do so."

Excepted to as defendant's Exception Number 40.

41. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I charge you that as between employer and employee the duty of so using a reasonably safe place; or so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master.

If, therefore, you find from the evidence that the injury to plaintiff complained of was due wholly to the negligence of the fellow-servants of said plaintiff employed by the same defendant in the same general business, in negligently failing to conform to an established and reasonably safe method of work or in negligently using a reasonably safe place, then, under such circumstances, your verdict must be for the defendant."

Excepted to as defendant's Exception Number 41.

42. In refusing to give to the jury, at the request of defendant, the requested instruction, as follows:

"I instruct you as matter of law that under the pleadings and the evidence in this case, James Spain, the woods foreman, and the plaintiff were fellow-servants employed by the same employer in the same general business, and that the defendant, therefore, is not responsible [137] for any negligence on the part of said James Spain, even if the evidence discloses any such negligence.

If, therefore, the injury to plaintiff complained of was due wholly to the negligence of said James Spain, your verdict must be in favor of defendant."

Excepted to as defendant's Exception Number 42.

43. In refusing to give to the jury, at the request of defendant, the requested instructions, as follows:

"I instruct you as a matter of law that under the pleadings and the evidence in this case, Gordon, Laird and Carey were fellow-servants of plaintiff employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such."

Excepted to as defendant's Exception Number 43.

44. In refusing to give to the jury, at the request of the defendant, the requested instruction, as follows:

"I instruct you that under all the evidence in this case, your verdict must be in favor of the defendant."

Excepted to as defendant's Exception Number 44.

45. And defendant specifies that said verdict is against law in this, that said verdict should have been in favor of the defendant herein.

Excepted to as defendant's Exception Number 45.

46. In entering judgment herein in favor of plaintiff.

Excepted to as defendant's Exception Number 46.

And defendant specifies that the evidence was insufficient to justify the verdict in that it appears that none of the injuries alleged to have been suffered by plaintiff were directly or proximately or at all caused by, or resulted from, the alleged acts or omissions on the part of the defendant charged in the complaint, but that it appears, on the contrary, that said injuries were brought on plaintiff by his own acts, and by the acts of other persons than this defendant. **[138]**

WHEREFORE SAID DEFENDANT PRAYS that the judgment of the District Court of the United States in and for the Northern District of California herein be reversed and set aside.

LILIENTHAL, McKINSTRY & RAYMOND,
Attorneys for said Defendant.

[Endorsed]: At 3 o'clock and 25 min. P. M. Filed Sep. 24, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. **[139]**

In the District Court of the United States, Northern District of California, Second Division.

HUGH DAVIS,
Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,
Defendant.

Order Directing Filing of Bond on Writ of Error and Staying Further Proceedings.

The defendant Metropolitan Redwood Lumber Company, having filed its petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed:

NOW, THEREFORE, IT IS ORDERED, that upon the said defendant Metropolitan Redwood Lumber Company filing with the clerk of this court a good and sufficient bond in the sum of Fifteen Thousand Dollars, to the effect that if said defendant Metropolitan Redwood Lumber Company and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the said obligation is to be void; otherwise **[140]** to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this court be, and they are hereby, suspended and stayed until the determination of said writ of error by the said United

States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated September 24th, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Oct. 1, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[141]**

In the District Court of the United States, Northern District of California, Second Division.

AT LAW.

HUGH DAVIS,
Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of attorneys for the defendant herein, and upon filing a petition for a Writ of Error and an Assignment of Errors,

IT IS ORDERED that a Writ of Error be, and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit the judgment heretofore rendered herein, and the other matters and things in said petition and assignment set forth, and that the amount of bond on said Writ of Error be and hereby is fixed at Five Hundred Dollars.

Dated September 24th, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Oct. 1, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[142]**

Bond on Writ of Error.

Know All Men by These Presents: That we, Metropolitan Redwood Lumber Company, a corporation, as principal, and The United States Fidelity & Guaranty Co., a corporation, as surety, are held and firmly bound unto Hugh Davis in the full and just sum of Five Hundred (500) Dollars, to be paid to the said Hugh Davis, his certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of September, 1912.

WHEREAS, lately at a District Court of the United States, for the Northern District of California, in a suit pending in said court, between said Hugh Davis, plaintiff, and said Metropolitan Redwood Lumber Company, defendant, a judgment was rendered against the said Metropolitan Redwood Lumber Company, and the said Metropolitan Redwood Lumber Company having obtained from said Court a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said Hugh Davis, citing and admonishing him to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OB-

LIGATION IS SUCH, that if the said Metropolitan Redwood Lumber Company shall prosecute its Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal] METROPOLITAN REDWOOD LUMBER COMPANY.
By THOS. G. ATKINSON,
Pres.

[Seal] THE UNITED STATES FIDELITY & GUARANTY CO.
By PETER BELCHER,
Attorney in Fact. [143]

State of California,
County of Humboldt,—ss.

On this 27th day of September, A. D. 1912, before me, I. R. Belcher, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Peter Belcher, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company, and the said Peter Belcher acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereunto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office in the county of Humboldt, the day and year in this

certificate first above written.

[Seal] I. R. BELCHER,

Notary Public in and for said Humboldt County, State of California.

The foregoing bond is approved as to form and sufficiency of surety this 1st day of October, 1912.

JOHN J. DE HAVEN,

Judge.

Filed Oct. 1, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[144]**

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States, Northern District of California, Second Division.

HUGH DAVIS,

Plaintiff,

vs.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,

Defendant.

I, W. B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred and forty-four (144) pages, numbered from 1 to 144, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the return to the an-

nexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $86.80, that said amount was paid by Lilienthal, McKinstry & Raymond, attorneys for the defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of December, A. D. 1912.

[Seal] W. B. MALING,

Clerk of United States District Court, Northern District of California.

[Seal] By J. A. Schaertzer,

Deputy Clerk. **[145]**

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Metropolitan Redwood Lumber Company, a corporation, plaintiff in error, and Hugh Davis, defendant in error, a manifest error hath happened, to the great damage of said Metropolitan Redwood Lumber Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceeding aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

J. A. S. D. C.

Witness, the Honorable ~~EDWARD D.~~ JOHN J. DE HAVEN, United States District Judge, ~~WHITE, Chief Justice of the United States,~~ Northern District of California, the 1st day of October, in the year of our Lord one thousand nine hundred and twelve.

[Seal] JAS. P. BROWN,

Clerk of the United States District Court, 9th Judicial Circuit, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

JOHN J. DE HAVEN,
District Judge. [146]

Due service of the within Writ of Error is hereby admitted this 7th day of October, 1912.

PUTER & QUINN,
Attorneys for Plaintiff, Hugh Davis.

[Endorsed]: 15,390. In the District Court of the United States, Northern District of California, Second Division. Hugh Davis, Plaintiff, vs. Metropolitan Redwood Lumber Company, a Corporation, Defendant. Writ of Error. Filed Oct. 1, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] W. B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Hugh Davis, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Metropolitan Redwood Lumber Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand at the city of San Francisco, in the District above named, this 24th day of September, A. D. 1912.

JOHN J. DE HAVEN,
Judge.

Due service of the within Citation upon Writ of Error is hereby admitted this 7th day of October, 1912.

PUTER & QUINN,
Attorneys for Plaintiff, Hugh Davis.

[Endorsed]: 15,390. In the District Court of the United States, Northern District of California, Sec-

ond Division. Hugh Davis, Plaintiff, vs. Metropolitan Redwood Lumber Company, a Corporation, Defendant. Citation upon Writ of Error. Filed Oct. 11, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk.

[Endorsed]: No. 2204. United States Circuit Court of Appeals for the Ninth Circuit. Metropolitan Redwood Lumber Company, a Corporation, Plaintiff in Error, vs. Hugh Davis, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed December 7, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. ——.

METROPOLITAN REDWOOD LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUGH DAVIS,
Defendant in Error.

Order Extending Time [to November 23, 1912] to File Record Thereof and to Docket Cause.

Good cause appearing therefor, it is ordered that

the plaintiff in error in the above-entitled cause may have to and including November 23, 1912, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 23, 1912.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 23, 1912. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. ——.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

Order Extending Time [to December 7, 1912] to File Record Thereof and to Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including December 7, 1912, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 21, 1912.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 21, 1912. F. D. Monckton, Clerk.

[Endorsed]: No. 2204. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——— to File Record Thereof and to Docket Case. Refiled Dec. 7, 1912. F. D. Monckton, Clerk.

[Notice of Attorneys for Defendant in Error.]

United States Circuit Court of Appeal, for the Ninth Circuit.

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

To the Honorable, United States Circuit Court of Appeal for the Ninth Circuit, and to Frank D. Monckton, Clerk of Said Court:

You will please take notice that the attorneys for the defendant in error in the above-entitled action are Messrs. Puter & Quinn, whose addresses are Nos. 616 Fourth Street, Eureka, California.

Dated October 19th, 1912.

PUTER & QUINN,

Attorneys for Defendant in Error.

HUGH DAVIS,

Defendant in Error.

[Endorsed]: No. 2204. United States Circuit Court of Appeal for the Ninth Circuit. Metropolitan Redwood Lumber Company (a Corporation), Plaintiff in Error, vs. Hugh Davis, Defendant in Error. Notice of Names and Addresses of Attorneys. Due service admitted this 22d day of October, 1912. Otto C. Gregor, Mahan & Mahan, Kenneth Knewett, Jr., Lilienthal, McKinstry & Raymond, Attorneys for Plaintiff in Error. Filed Oct. 24, 1912. F. D. Monckton, Clerk. Refiled Dec. 7, 1912. F. D. Monckton, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NORTH JUDICIAL CIRCUIT.

METROPOLITAN REDWOOD LUMBER COMPANY
(a corporation),
Plaintiff in Error.
(Defendant below)

vs.

HUGH DAVIS
Defendant in Error.
(Plaintiff below.)

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT OF THE CASE.

The defendant in error (plaintiff below) brought this action against the plaintiff in error (defendant below), to recover damages suffered in consequence of injuries received by being struck upon the leg by a parted "Tommy Moore" strap used in logging operations.

The plaintiff in error carries on a lumber mill and logging operations at Metropolitan, Humboldt County, California, and in its business of logging is obliged to

drag logs over the uneven and rough surface of the ground to its landings along the railroad whence they are forwarded by railroad train to the mill.

Inasmuch as the surface conditions are such that it is rarely possible to obtain a direct straight course over which to conduct the logs, it is necessary to frequently use an instrument known as a "Tommy Moore," which, in effect, is in the nature of a large block, for the purpose of changing the course of direction of the approaching log. This "Tommy Moore" is fastened to a convenient stump by means of a wire cable, commonly spoken of as a "Tommy Moore strap."

The appropriate length of the strap is dependent upon the size of the stump around which said strap is to be placed, and the distance the "Tommy Moore" is to be located from said stump, all of which is to be determined each time a new layout is made or a "Tommy Moore" is to be set; that is to say, if logs are to be hauled from a certain point the donkey engine is usually set on a landing, and the main line or cable is stretched to the place from which the logs are to be hauled. Owing to the broken surface conditions of the ground, a change of direction in which the log is to be hauled is often necessary, and at each angle a "Tommy Moore" is set, by fastening it to some convenient stump. The cable by which the "Tommy Moore" is fastened to the stump is called a "Tommy Moore strap" and consists of a piece of cable, or wire rope of sufficient length, with an eye splice in each end, which ends are attached to the "Tommy Moore" and the loop placed over and around a stump. Meanwhile the main cable directly attached at

one end to the log runs through the wheel of the "Tommy Moore," while the other end is attached to the spool of the steam donkey.

At the time he was injured defendant in error was working with the rigging crew as a "chaser," his duties being to watch the log through the "Tommy Moore" and signal to the engineer to stop the power or put it on. In other words, to tend the "Tommy Moore," to care for it, etc. (Transcript pp. 56 and 57)

He was an experienced woodsman, having been employed in the woods since 1906, and had worked from the 1st of April, 1910, until the 15th of August, 1910 the day of the injury, with the rigging crew (Tr. p. 63).

In order to facilitate the disconnection of the main cable and the "Tommy Moore" after the log had reached the "Tommy Moore" and was about to change its direction toward the landing, there was what was termed a "tag line," i. e., a cable about ten feet in length connected with the "choker" around the log and the end of the main cable. As soon as this "tag line" passed through the "Tommy Moore," the "chaser" would signal the engineer to stop.

He would then remove the "tag line" and connect the main cable directly to the "choker," signal the engineer to go ahead, and the log would assume its direct course to the landing. (Tr. p. 64).

At the time of the injury when defendant in error was in a position near the "Tommy Moore" (Tr. p. 60), the "Tommy Moore" strap broke and, swinging around the stump struck defendant in error and caused the injuries complained of.

In the amended complaint of defendant in error, his entire action is based upon the theory that plaintiff in error failed in its duty to him in not providing a reasonably safe appliance, i. e., a safe "Tommy Moore strap." In other words, he presents a cause of action cognizable under Section 1971 of the Civil Code of California, which provides that

> "An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care."

The gist or gravamen of the action is contained in paragraphs IV, V, VI and VII (Tr. pp. 28 and 29) of the amended complaint, and are as follows:

> IV.
>
> That the said "Tommy Moore strap" was so carelessly and negligently made and constructed by the said defendant, that the said "Tommy Moore strap," at the time the plaintiff was injured by the breaking of said "Tommy Moore strap" as hereafter alleged, was dangerous to use and operate in holding and keeping said "Tommy Moore" in place, and in that behalf plaintiff alleges: that said defendant carelessly and negligently made and constructed said "Tommy Moore strap" out of an old, rusty, badly worn cable, about one inch in diameter that did not have the tensile strength sufficient to hold the said "Tommy Moore" in place, while said saw logs were being hauled or dragged as aforesaid.
>
> V.
>
> That common, ordinary care and reasonable care and prudence required and demanded that said "Tommy Moore strap" should be made and constructed of wire rope, having sufficient tensile strength to hold said "Tommy Moore" in place and

withstand the strain thereon while said saw log was being hauled or dragged along said road or dragway as aforesaid.

VI.

That said defendant carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore strap" as aforesaid, and on the 15th day of August, 1910, and at all times herein mentioned, said "Tommy Moore strap" was in an unsafe, dangerous and defective condition.

VII.

That said defendant so carelessly and negligently made, constructed, kept and maintained said "Tommy Moore strap" as aforesaid, that the same was, on the 15th day of August, 1910, and for a long time prior thereto, in an unsafe, defective and dangerous condition, in this that the said "Tommy Moore strap" was made out of an old, badly worn, weak, rusty cable about one inch in diameter, that did not have or possess sufficient tensile strength to withstand the strain thereon, when said "Tommy Moore" was being used as aforesaid, and had no means of protection to prevent said "Tommy Moore strap" from striking persons working near or around said "Tommy Moore" in case the said "Tommy Moore strap" should give way or break.

The issues were definitely made up upon this complaint. The plaintiff in error came into Court prepared solely to meet such issues and had a right to rely on the fact that no other issue would be presented or tried. Yet at the trial the defendant in error wholly abandoned his cause of action set forth in the complaint and presented a cause based on the theory that the injury was due, not to the negligence of the plaintiff in error, but entirely due to the negligence of one Gordon, the hook

tender, the man in charge of the crew of five men with whom defendant in error worked, and who was under the immediate supervision of Spain, the woods foreman. (Tr. p. 69).

That is to say, while pleading a cause under the general and common law liability and as based upon Section 1971 of the Civil Code defendant in error has recovered a judgment under an entirely different cause of action, i. e., a cause of action based entirely upon that portion of the amendment of 1907 to 1970 of the Civil Code which reads:

> The employer shall be liable for such injury when the same results from the wrongful act, neglect or default * * * of a person employed by such employer having the right to control or direct the services of such employee injured.

In other words, the plaintiff in error appeared prepared to meet and did meet fully, not only by its own evidence, but by the unanimous voice of the witnesses for defendant in error, all issues tendered by the complaint, but as the pleadings gave no intimation whatever to the effect that defendant in error intended to depart from his pleadings and present a cause of action wholly based on Gordon's negligence, the plaintiff in error was left entirely without any witnesses upon such issue; it did not have an opportunity to produce even Gordon himself to tell his story, with the result that for an injury to a leg which his physician pronounced nearly well at the time of the trial (Tr. p. 55), the jury awarded a verdict of ten thousand ($10,000.00) dollars, outrageously incommensurate with the damage even in a clear undisputed case of negligence.

In this case the evidence showed absolutely without conflict that the only duty of the plaintiff in error was to furnish reasonably safe and suitable material, i. e. wire rope, out of which the workmen themselves were to construct the strap. From the very nature of the business, this method was necessary; for, in the frequent moving and readjustment of the "Tommy Moore" to new ground and stump conditions, the strap necessarily had to be of different lengths.

The defendant in error testifies (Tr. p. 65):

> Two fellows by the names of Carey and Laird * * * I know they made it (the strap) * * * They were members of the crew I was working with * * * Well, it (i. e., the "Tommy Moore strap") was made out of material they got from the company. It was kept there what the company furnished and the members of the crew selected from that material and made the strap.

Again the defendant in error testifies (Tr. p. 69):

> The hook tender, his name was Gordon, and a fellow named Mike Carey and Mr. Laird and the engineer, his name was Brunius. The whistle boy was up in the woods. That composed the whole crew. The hook tender (Gordon) had charge of the crew * * * He was under Spain, the foreman.

Paul Laird testified (Tr. p. 71):

> Two other fellows and myself made that strap * * * The hook tender instructed us to make that strap * * * His name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to me. He showed us the cable to make the strap of.

This witness also testified that the strap which injured defendant in error was made after a certain Tacoma donkey had arrived, but before this Tacoma

donkey had gone to work. That there came with the Tacoma donkey a large amount of main line cable; that there was so much of this cable that it could not be wound on the drum and quite a bit had to be cut off, and was left in the neighborhood. (Tr. p. 76).

In other words, Laird, the first witness called by defendant in error admits the fact which is undisputed and confirmed throughout the case, that at the very time Gordon instructed Laird to select the defective piece of rope out of which to make the strap, the plaintiff in error had furnished him a large amount of *absolutely new* cable, which he was at liberty to use for that purpose.

Michael Carey for defendant in error testified (Tr. p. 80):

> The chain tender (Gordon) told me to take that strap * * * He showed us what piece to take * * * (Tr. p. 78). Gordon was the foreman of that crew, and had full charge. It was his duty to make these straps when they broke, or when they were needed *and he could go ahead and take any material he could find that was sufficient for that purpose.*

Again (Tr. p. 81) Carey testified:

> The new Tacoma donkey came a couple of weeks before the injury. Fourteen hundred feet of new rope or new cable came with that. Probably four or five hundred feet were cut off, because they could not get it on the drum. That remained around the landing. The "Tommy Moore strap" could have been made out of that if it was necessary. If Gordon had wanted to he could have made it out of that piece of new line.

The above witnesses were all called by the defendant in error.

James Spain, witness for plaintiff in error, testified (Tr. pp. 89 and 90):

> Fourteen hundred feet of inch and a quarter main line came with the new donkey * * * This fourteen hundred feet of line was available for their use. There was other line there available for their use, two thousand feet of inch and a quarter across the track on the other donkey, probably 75 or 80 feet distant * * * I remember them getting ready and putting the new line upon the donkey. There was too much of it. * * * They cut off a piece 200 or 250 feet. That laid there along side of the donkey. That line was available for any purpose they wished to use it for. It was available for "Tommy Moore" straps, if they desired to use it * * * The hook tender, Gordon, had charge of the selection of the rope that was used for any purpose by the crew.

Again (Tr. p. 90) Spain testified:

> The hook tender Gordon, had charge of the selection of the rope that was used for any purpose by the crew. Most anyone of the crew can make the "Tommy Moore" straps. All the rigging crew actually do make them, that is including Gordon and those under him.

Again (Tr. p. 91) Spain testified:

> I have never given the hook tender or crew any instructions regarding what rope shall be used in their work. The hook tender has the discretion in the selection of any rope used by them. In this particular instance, Red Gordon was the hook tender. Red Gordon had the selection of any rope or cable that was used on these operations.

Again (Tr. p. 93) Spain testified:

> The strap that went around that stump was twenty-five or thirty feet long. These straps would have different lengths, depending upon the location of the stump to the roadway. That is the reason the workmen had to make them themselves. They have to make a new "Tommy Moore" strap for each new direction in which they draw the logs, that is, unless it was a straight pull, or unless a former strap would answer the purpose. It is made with two eyes splices in it, one on each end, one eye splice on each end, and as the crew are directed to go, or as they go to different logging operations they themselves have to make a strap for each new situation.

SPECIFICATION OF ERRORS RELIED UPON.

I.

Error of the Circuit Court in denying the motion to strike out the answer of witness Laird to the question:

> Q. Go on and state what he said about that?
>
> A. Well, in our conversation, whatever it was, I don't distinctly remember at present; he said he wanted to get a new piece out of the new line but they would not stand for it. They said use the old line; the old line was good enough. He didn't say who it was.

Excepted to as Defendant's EXCEPTION NO. 8.

II.

Error of the Circuit Court in denying motion for nonsuit at close of plaintiff's case on the grounds:

1st. That the evidence is not sufficient to justify a verdict in favor of the defendant in error under the pleadings in this case.

2nd. That there is a fatal variance between the pleadings and the proof.

3rd. That the defendant in error assumed the risks of his employment and that said injury occurred by reason of one of the assumed risks.

4th. That defendant in error was guilty of contributory negligence.

5th. That the injury was occasioned by the act of a fellow servant for which plaintiff in error was not responsible.

Excepted to as Defendant's EXCEPTION NO. 9.

III.

Error of the Circuit Court in denying motion for nonsuit made at the close of the testimony in the case on the grounds:

1st. That the evidence is not sufficient to justify a recovery under the pleadings.

2nd. That there is a variance between the allegations and the proof.

3rd. That no recovery can be had for any alleged cause set forth in the amendment of the year 1907 to Section 1970 of the Civil Code of California.

4th. That the defendant in error was injured by the ordinary risks of the business which he had assumed.

5th. That defendant in error was guilty of contributory negligence.

6th. That any injury suffered by defendant in error was caused by the negligence of a fellow servant or fellow servants employed by plaintiff in error in the same general business.

Excepted to as Defendant's EXCEPTION NO. 10.

IV.

Error of Circuit Court in giving to the jury over the objection of plaintiff in error the following instruction:

I instruct you that if you find from a preponderance of the evidence that at the time plaintiff was injured that he was occupying the position that the duty of his employment required him to occupy, and you further find from such evidence that the defendant was negligent for the reason alleged in the complaint, in not furnishing or providing a reasonably safe or suitable "Tommy Moore" strap, and that such negligence, if such you so find, directly or proximately contributed to the injuries plaintiff complains of, and the plaintiff was not aware of such defective condition of said "Tommy Moore" strap, if such condition you find existed, then unless plaintiff through negligence contributed to such injury, your verdict must be for the plaintiff.

Excepted to as Defendant's EXCEPTION NO. 17.

V.

Error of Circuit Court in giving to the jury over the objection of plaintiff in error, the following instruction:

In addition to these instructions, I will give you the following: An employer is not bound to indemnify his employee for loss suffered by the latter in consequence of the ordinary risks of the business in which he is employed nor in consequence of the negligence of another person employed by the same

employer in the same general business, provided nevertheless an employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or a person employed by such employer having the right to control or direct the services of such employee injured.

Excepted to as Defendant's EXCEPTION NO. 28.

VI.

Error of Circuit Court in giving to the jury over the objection of plaintiff in error, the following instruction:

The evidence in this case shows without any conflict that if there was any negligence in the construction or use of this "Tommy Moore" strap, that it was the negligence of the foreman of the crew there, Gordon, and for that negligence, if there was any, the defendant would be responsible.

Excepted to as Defendant's EXCEPTION NO. 29.

VII.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction, as follows:

I charge you that it is the duty of an employer to exercise ordinary care to furnish a place to work and appliances reasonably safe and suitable for the use of his employees. But this duty has its reasonable and rational limits, and when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the construction of appliances for the use in work the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances

themselves out of such material for such work, then under such circumstances, the duty of exercising reasonable care to construct such appliances is that of the employees and not that of the employers.

If, therefore in this case you find from the evidence that the defendant did exercise ordinary care in furnishing reasonably safe and suitable material for the construction of "Tommy Moore" straps, to be used by its employees in constructing such straps for use in work, the character or place of which necessarily changed as the work progressed, and that certain of such employees of defendant being fellow servants of plaintiff employed by the same defendant in the same general business, did in the course of their duty construct the "Tommy Moore" strap which broke and injured plaintiff, out of the material so furnished by defendant, and if you further find that in so constructing said strap said fellow employees of defendant negligently selected defective material for such construction, and that the injury to plaintiff was caused solely by reason of such negligence on the part of his fellow servants in so negligently selecting defective material in the construction of said strap, then I charge you that under such circumstances such negligence would be the negligence of fellow servants of plaintiff, and your verdict should be for defendant.

Excepted to as Defendant's EXCEPTION NO. 38.

VIII.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction as follows:

I charge you that while it is the duty of the employer to provide a reasonably safe place for employees to work, including the maintenance of the place in such reasonably safe condition, neverthe-

less, such duty of maintenance is not so absolute as to charge the employer with liability for injuries to employees resulting from the place becoming unsafe through the negligent performance of the work there carried on.

I further charge you that the duty of an employer to provide a safe place is dependent upon the character of the work to be done there, and when that work is one of construction or reconstruction, the risks which are incident to such places and kinds of work are assumed by the employees there employed.

Excepted to as Defendant's EXCEPTION NO. 39.

IX.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction, as follows:

I instruct you as a matter of law that under the pleadings and the evidence in this case, Gordon, Laird and Carey were fellow servants of plaintiff employed by the same employer in the same general business, and that the defendant is not responsible for any negligence on the part of them or any of them, if the evidence discloses any such.

Excepted to as Defendant's EXCEPTION NO. 43.

X.

Error of Circuit Court in refusing to give to the jury at the request of plaintiff in error, the requested instruction as follows:

I instruct you that under all the evidence in this case your verdict must be in favor of the defendant.

Excepted to as Defendant's EXCEPTION NO. 44.

XI.

Error of Circuit Court in entering judgment herein. Excepted to as Defendant's EXCEPTION NO. 45.

XII.

And plaintiff in error specifies that the evidence was insufficient to justify the verdict, in that it appears that none of the injuries alleged to have been suffered by defendant in error were directly or proximately, or at all caused by, or resulted from, the alleged acts, or omissions on the part of the plaintiff in error charged in the complaint, but that it appears on the contrary that said injuries were brought on defendant in error by his own acts, and by the acts of other persons than this plaintiff in error.

ARGUMENT.

The cause of action alleged in the amended complaint is manifestly a cause of action resting upon the *general and common law liability of master and servant.* In fact it would be difficult to conceive of language which would more directly rest a cause of action on the general and common law liability of master and servant than that contained in the amended complaint in this action.

It appears from the testimony without contradiction that plaintiff in error had fully complied with its duty in exercising ordinary care to furnish reasonably safe and suitable material out of which the employees themselves were to make the "Tommy Moore" straps. The fact that Gordon, a fellow servant, though superior in

rank, committed a negligent act in selecting a defective cable when there were ample brand new cable on hand, available for that purpose, cannot under the pleadings affix any liability upon the plaintiff in error.

The learned trial Judge appreciated the strength of the evidence upon this point as appears from the instructions given by him and embodied in No. 29 of the specifications of error of law as follows:

> The evidence in this case shows without any conflict that if there was any negligence in the construction or use of the "Tommy Moore" strap, that it was the negligence of the foreman of the crew there Gordon, and for that negligence, if there was any, the defendant would be responsible.

This instruction which, it is submitted, was clearly erroneous as to the law applicable, yet nevertheless, shows that the Court's view of the effect of the testimony was similar to that herein presented.

We submit that this particular instruction of the Court, clearly erroneous under the pleadings in this case, as we contend, left the jury no option whatever, but required them to find a verdict in favor of the defendant in error, inasmuch as all the testimony clearly showed that the only negligence was that of Gordon in selecting a defective cable out of which to make the strap, instead of a suitable and safe piece out of the abundance furnished by the plaintiff in error for his use.

The rule is well settled that when the employer has exercised ordinary care to furnish material reasonably safe and suitable to be used by his employees in the

construction of appliances for use in work, the character or place of which necessarily changes as the work progresses, and it is the duty of such employees to construct such appliances themselves out of such material for such work, the duty of exercising reasonable care to construct such appliances is that of the employees, and not of the employer.

In the case of *Leishman* vs. *Union Iron Works*, 148 Cal. 274, it was the duty of the foreman of the molding department to furnish the molders with certain "plates" to be used in manufacturing moldings for casting piston rings. The defendant furnished for use of such foreman "plates" other than the one selected by the foreman at the time of the injury, and it was the duty of the foreman to select such "plates" as were proper for the job.

The testimony showed that the injury in question might have been caused by the selection by the foreman of a "plate" in a dangerous condition by reason of rust. It was held:

> There can be no doubt but that the settled rule is that an employer must provide his employees with safe appliances with which to do the work for which they are engaged; that he must keep such appliances in reasonably safe condition, and that this is a personal obligation which cannot be delegated so as to relieve the employer from liability in not having done so. But there is no positive duty incumbent upon an employer to furnish such appliances to do the work as completed instruments. He may supply sufficient and suitable materials to the employees themselves out of which the appliances with which they are to work are to be constructed and adjusted by them, in which

> case the general rule that safe appliances shall be furnished by the employer—that is, that efficient and complete appliances shall be furnished by him —has no application. His obligation to his employees as far as furnishing such appliances is concerned is satisfied when he furnishes suitable materials with which to construct them, and under the terms of the contract of employment, either express or implied, the employees themselves are to do the constructing. In that event the employer is not liable for an injury through a defect in the construction or adjustment of such appliances.

See also *Burns* vs. *Sennett,* 99 Cal. 363.

Kerrigan vs. *Ry. Co.,* 138 Cal. 511.

In the case of *Callan* vs. *Bull,* 113 Cal. 593, it is held that

> A superintendent employed by the contractor to represent him in the work is his vice-principal or agent as respects the furnishing of suitable appliances which it is the employer's duty to furnish; but where the appliances are to be constructed or adjusted by the servants themselves out of materials furnished by the employer, all of the employees, including the superintendent, are fellow servants, irrespective of rank, as to any defect or negligence in their construction or adjustment, and the employer is not liable for such defect or negligence.

To the same effect see *American Bridge Company* vs. *Seeds,* 144 Fed. R. 605.

PURPOSE, SCOPE AND EFFECT OF SECTION 1970 OF THE CIVIL CODE AND AMENDMENTS THERETO.

Prior to the amendment of 1907 to Section 1970 of the Civil Code of the State of California, the provisions of this section were simply declaratory of the

master's common law liability that existed at that time by judicial decisions.

Cosgrove vs. *Southern Pacific R. R. Co.*, 88 Cal. 360-367.

Not only in the State of California, but in practically all of the States, so far as our research has gone, the liability of the master was declared by judicial decisions as existing at common law to the same extent as appears in Sections 1970 and 1971 of the Civil Code, and under the doctrine recognized and approved by an unbroken line of judicial decisions of all the courts of the land, the master was clearly not liable for the negligence of a fellow servant, in the same general business.

This doctrine has been so clearly established that it is unnecessary to cite any authorities at this time.

By the enactment or adoption of Section 1970 of the Civil Code of the State of California as originally adopted there was but carried into statute the previous and then prevailing common law rule as promulgated by the judiciary of this country, that the master is not liable for the negligence of a fellow servant.

So when Section 1970 of the Civil Code was originally enacted, so far as this State is concerned, it was merely declaratory of the common law that prevailed.

Judd vs. *Letts*, 158 Cal. 363.

In the year 1907, said section was amended to read as it is at the present time.

In England in 1880, and subsequent to that time in a great many States of the Union, laws were passed,

known as the Employer's Liability Acts, and various State Acts having for their foundation the original English Act of 1880, and the construction so far as those acts are concerned has been uniform to the effect that the doctrine of fellow servant was modified by those acts, and that *new causes of action were thereby created, to the extent of the enumerated instances* specified in the respective acts. In these Liability Acts, causes of actions are given to various named persons and classes of persons therein enumerated.

The amendment of 1907 to Section 1970 of the Civil Code of California seems to have been borrowed from the Employer's Liability Act of the State of Mississippi, and more nearly resembles it than any other act we have been able to find, and in interpreting that act the Supreme Court of Mississippi in the case of *Bussie* vs. *Gulf & S. I. R. Co.*, 31 Southern 213, uses this language:

> It was left for the framers of the Constitution of 1890 to accomplish this greatly needed change; and Section 193 of the Constitution which created for the first time in this State, new, wholly-new rights and causes of action never existing before, effected this change. It is indispensable to understand that Section 193 did create the rights and causes of action it provided for (72 Mississippi 16). It provides that as to employees injured by the negligence of fellow servants, of the class described in Sec. 193 there should exist thereafter, as there had never done before, these causes of action.

In Mobile J. & K. R. Co. vs. *Hicks*, 46 Southern 366, the Supreme Court of Mississippi in speaking of the scope and effect of Section 193 of the Constitution of that State held:

> Section 193 was intended primarily for the benefit of the injured employee. Rights of actions which were unknown before were created for the benefit of certain employees of railroads.

Again at page 368 of the same case the Court held:

> We think, however, that this Court will stand by the theory carefully defined in the Bussie case; that it will continue to treat Section 193 of the Constitution as being the originator of certain causes of action, the employment of which must be developed by legislation formed for that specific purpose; that it did not create these causes of action with the intention that they should be henceforth treated as belonging to the same class with all other causes of action for personal injuries. This Court has in the White and Bussie cases expressly decided that the said section creates "causes" of action, and that these causes of action were wholly unknown before. *It is not held that the said section simply abolishes defenses to actions which could be maintained theretofore. The causes themselves were created.* (Italics ours).

In the case of *White* vs. *Louisville, N. O. & T. Ry. Co.,* 16 Southern, 248, after reciting the facts of the case the Court uses this language:

> The ground of liability is the common law duty of the apellee to provide safe machinery and appliances for its employees. The remedy to enforce this liability in favor of appellant, in the case made in this record, is based properly on Section 663, Code 1892. The negligence alleged is not the negligence of a co-employee, but the negligence of the company itself. The Hunter case, 70 Miss. 471, 12 South. 482, therefore does not apply. The ground of liability on which this case is rested existed before the Constitution of 1890 and is wholly independent of it. That instrument did not take away any existing ground of liability; it added new ones theretofore denied by our laws.

We contend, therefore, that the amendment of 1907 to Section 1970 of the Civil Code of the State of California merely creates new and additional liabilities on the part of the master. Liabilities resting solely on the statute and constituting new causes of action in favor of the servant.

These new liabilities are purely creatures of the statute.

It is to these extended and enlarged liabilities that the Legislature applied and clearly intended to apply the remedy therein provided for cases wherein injury or death results by reason of the enlarged and statutory liabilities of the master for the negligence of the fellow servants in the particular instances enumerated in the amendment.

In considering the Liability Acts the Courts have uniformly abided by the theory that the purpose of such acts was simply to enlarge the liability of the master and extend the rights of the servant, and that those acts when construed, should be interpreted in the light of that purpose and, unless such result was absolutely inevitable, should not be construed as in any way taking from the employees any of the rights and remedies that existed at the time of their passage under the general law.

Plainly the amendment of 1907 to Section 1970 of the Civil Code is an introduction in this State for the first time of any Employer's Liability Act. At the time of its adoption, if an employee suffered injuries under the

same state of facts as alleged in the complaint in this action, an action could have been maintained by him under Section 1970 of the Civil Code as it stood prior to the amendment of 1907.

Unless the unequivocal mandate of the amendment so demands the rights and remedies, arising out of the relation of master and servant, in force and effect at the time of its enactment, should not be held to have been abrogated or wiped from our laws. This is particularly true in view of the evident purpose of the Employer's Liability Act in extending and not restricting the rights of the employee and the consequent and logical conclusion that no construction thereof should receive judicial sanction which would to any extent interfere with or prejudice any of the rights and remedies theretofore existing on behalf of the employee or his survivor unless positively demanded by plain and unambiguous legislative command.

Therefore, as the law stands to day, an action for personal injuries may be predicated upon two distinct bases or theories as warranted by the facts, viz:

1st. Upon the general or common law as to the primary duty of the master to his servants, and which duties he must perform, are to furnish such servants with suitable machinery and appliances with which the services are to be performed; to afford them reasonably safe places in which to perform their labor and to use due care in the selection of fit and competent fellow-employees under Section 1971 of the Civil Code, or under that portion of Section 1970 Civil Code which

makes the employer liable when the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or where he has neglected to use ordinary care in the selection of the culpable employee.

Skelton vs. Pacific L. Co. 140 Cal. 507
Callan vs. *Bull* 113 Cal. 593.
Donnelly vs. *San Francisco Bridge Co.* 117 Cal. 417.

2nd. Upon the statutory grounds, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, *or of a person employed by such employer having the right to control or direct the services of such employee injured* as now specified in Section 1970 of the Civil Code.

Our contention is that in order to base or predicate a cause of action on any of the statutory grounds contained in the amendment of 1907 to Section 1970 of the Civil Code, to-wit:

> That the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control and direct the services of such employee

it is necessary to allege and set forth in the complaint facts which bring him within the provision of the amendment upon which he relies.

As stated earlier in this brief, the complaint in this action states, and only states a cause of action based

or predicated on the general or common law liability of the master to his servant.

It does not even attempt to state a cause of action based on or predicated on the statutory liability as laid down in Section 1970 of the Civil Code, and especially on that portion of said section wherein it gives to the injured employee a cause of action for "an injury which resulted from *the wrongful act, neglect or default of any agent, or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control and direct the services of such employee injured.*"

It is an elementary principle of law that "*where a party relies for recovery upon a special statute creating a liability where none existed before he must set forth in ordinary and concise language a statement of facts showing his right to recover under the statute.*"

Kelly vs. *Northern Pacific R. Co.* 88 Pacific Rep. 1009.

Union Pacific R. R. Co. vs. *Wyler* 158 U. S. 987.

Fountain vs. *Southern Pacific R. Co.* 54 Cal. 645.

Indianapolis & G. R. T. Co. vs. *Foreman* 69 N. E. 676.

American Rolling Mill Co. vs. *Hullinger* 69 N. E. 460-2.

Austin vs. *Goodrich* 49 N. Y. 266, 31 Cyc. 115, and cases cited.

The case of *Kelly* vs. *Northern Pacific R. Co.*, above cited, was a case identical in principal with the case at bar.

There the complaint in substance alleged that the defendant company so negligently managed, operated and run its cars as to cause plaintiff to be thrown off and injured.

On the trial the plaintiff sought to prove that he was injured through the carelessness and negligent acts of an engineer in the operation of the engine with which they were working.

The defendant thereupon interposed the following objection:

> I object, upon the ground that under the pleadings in this case no proof can be offered of any alleged negligent actions of the engineer in operating the engine attached to this string of cars, for the reasons, first, that the pleadings here alleged negligence, not on the part of any employee of the company defendant, but only negligence on the part of the defendant company itself causing the injury to the plaintiff; second, for the reason that to show negligence on the part of the engineer would be, at common law, to defeat the right of recovery, because it would be barred as being the negligence of a fellow servant; and this complaint will not warrant a recovery upon the statutory cause of action afforded by the act of 1905, the so-called Fellow-Servant Act, for the reason that it does not in terms aver an essential element of said statutory right, viz: that the negligence of some employees of the defendant engaged in the operation of the railway; also, in connection with the statement of counsel that negligence of the engineer was proposed to be proved, you cannot show fault of the engineer under either act of 1905, or the so-called Fellow-Servant Act of 1903, because each of these acts gives now an exceptional statutory right, and that right is dependent upon the neglect being that of some other servant or employee under

> the act of 1905, or that of the engineer and other enumerated persons under the act of 1903, and to recover under the statute, there must be an averment that the neglect relied upon and proposed to be proved was that of another employee, if under the act of 1905, or the engineer if under the act of 1903.

The trial Court sustained the objection.

In affirming the ruling of the trial Court, the Supreme Court of Montana stated:

> When tested by the rules of pleading, we think it is evident that this action is not predicated upon any of the provisions of the employers' liability acts of this State; for the rule is well settled that, when a party in his pleading seeks to avail himself of the benefits of a statute, he is required by the averments thereof to bring himself fully within the provisions of the statute upon which he relies. *Indianapolis, etc., Co.* vs. *Foreman* 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185. A complainant who seeks to base an action on any of the provisions of the employers' liability act must by positive and direct averment of facts show that the action falls within the particular provision on which he relies.
>
> In order to settle the rule in this State, we decide that, when a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under the statute.

The case of *Union Pacific R. Co.* vs. *Wyler* cited above was also a similar case and in deciding that case Mr. Justice White, who delivered the opinion, states:

> If, however, he commences his action, and relies upon his common law right, we do not think he can amend his common law declaration by setting

out the statute, and relying upon that for his right to sue and for his recovery. In this case the original declaration was founded upon the common law right. Nothing was even intimated therein to the effect that he relied upon the statute. According to the decision in *Exposition Cotton Mills* vs. *Western & A. R. Co.* and cases cited therein, made this term, 83 Ga. 441, this amendment would have added a new and distinct cause of action.

It required the pleading of the statute to give them any vitality at all. As we have seen, that statute is not mentioned or intimated in the original declaration, and hence to have allowed the amendment offered, would have been allowing the introduction of a new cause of action.

Citing 83 Ga. 659; 69 Ga. 47; 108 Ill. 91; 85 N. C. 156; 59 Tex. 615; 43 N. J. L. 430; 11 Kas. 176 and 107, Ill. 340.

Quoting further from the same opinion:

The question then is, does the second amended petition state a new cause of action, so as to amount to a departure? In examining this question we must bear in mind what is the common and general law governing the relation of master and servant which prevails also in Missouri. By this law a servant cannot recover from a common master for injuries suffered from the negligence of a fellow servant.

However, where the master knowingly employs an incompetent servant, or when he keeps a servant in his employ after he has acquired knowledge of his incompetency, he is liable for damages caused to a fellow servant resulting from such incompetency. The statute of the state of Kansas which makes employers operating a railroad liable to one servant for the neglect of another without regard to the rule of incompetency as above stated, is

clearly in derogation of the general law, which, as we have said, prevails in Missouri where the action was originally brought.

The first petition manifestly proceeded exclusively on that part of the general rule which holds the master liable who with knowledge employs or retains an incompetent servant. It made no reference to the Kansas statute, and did not directly aver negligence on the part of the fellow servant, except in so far as this might be inferred from the averment of his incompetency * * *

It seems impossible to conceive of language which could more directly rest the cause of action on the general or common law of master and servant * * *

A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not per se a charge of negligence on the part of the fellow servant, then the averment of negligence, apart from the incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law.

In the case of *Indianapolis & G. R. T. Co.* vs. *Foreman* 69 N. E. 676, it is stated:

It is a well settled rule that when a party seeks the benefit of a statute he must by averment and proof bring himself within its provisions.

In *American Rolling Mill Co.* vs. *Hullinger* 69 N. E. 460, at page 462, the Court states:

> As to the sufficiency under the employers' liability act the general rule is that, if a person seeks to maintain an action under a statute, he must state specially every fact requisite to enable the Court to judge whether he has a cause of action under the statute.

In *Austin* vs. *Goodrich* 49 N. Y. 266, it is stated:

> Where one seeks to maintain an action under a statute it is a sound and well settled rule of pleading that he must state specially every fact requisite to enable the Court to judge whether he has a cause of action arising under the statute.

In *Fountain* vs. *Southern Pacific R. Co.*, 54 Cal. 645, it is held:

> Where the non-performance of a duty imposed by statute is relied upon as the gravamen of the action, the conditions in view of which the duty is to be performed, must be averred.

In view of the foregoing and numerous other authorities which we deem unnecessary to cite, we submit that the cause af action alleged in the amended complaint in this case is one resting entirely and solely on the common law liability of the master to the servant, and in no manner nor by any construction can be claimed to be based upon that portion of Section 1970 included in the amendment of 1907 whereby the employer is made liable for an injury *when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured.*

Nowhere in the amended complaint is there any allegation or reference to the injury being caused by the wrongful act, neglect or default of any agent or officer of the defendant, superior to the employee injured, or of any person employed by such employer having the right to control and direct the services of the employee injured.

In the case of *Brown* vs. *Central Pacific Railroad Co.* 68 Cal. 173, it is stated:

> In our opinion, the question of the responsibility of a common employer for the acts or negligence of another person employed in the same general business (Sec. 1970 Civil Code) is not here presented. The case as presented in the complaint is of alleged acts and omissions on the part of the defendant itself, as employer (Sec. 1969 Civil Code). Whether the proofs will sustain the allegations is not now for consideration. As against positive allegations that the acts and omissions complained of were by the defendant we cannot presume that they were those of a fellow employee of the deceased.

Therefore the defendant had the right to assume and did assume that plaintiff's cause of action was based on the common law liability of the employer and not on any statutory liability for the reason that no facts were alleged which would bring his case within the statute.

It was contended by the attorneys for defendant in error in the case at bar that a corporation can only act through its officers, agents and servants, and therefore when it is said that defendant negligently and carelessly

made and constructed the "Tommy Moore strap," the inference is natural that the person or persons making said strap was another employee of defendant.

The case of *Kelly vs. Northern Pacific Ry. Co.*, 88 Pacific Reporter 1011, above cited, clearly answers this contention wherein it is stated:

> To adopt this reasoning would be to lose sight of the distinction between the acts of a corporation, which though performed by an agent, are yet in law primarily the acts of the principal, and those other acts of its agents which, though the master may be liable for them, are yet primarily the acts of the servant, and for which the master is only liable on the principle of respondent superior. The recovery in the one case rests upon a breach of primary duty on the part of the employer, and the other upon the principle that the master is liable for the negligent acts of those he employs in the prosecution of his business.

Counsel for plaintiff urged at the trial that because the Supreme Court of California had in one or two cases observed in effect that the main purpose of the amendment of 1907 to 1970 Civil Code was to modify the defense based on the "fellow servant rule, that therefore there was no other purpose in its enactment. From this they argue that such amendment did not create a new cause of action.

That one of the purposes of the amendment was to modify the "fellow servant" defense in certain cases may be freely conceded; and when the Supreme Court used the language relied upon, it was speaking of conditions involving the question of defense and its language was perfectly appropriate to the issues therein involved.

Nevertheless, that amendment also did create an absolutely new right of action where none existed before. If counsel denies this, let them explain just under what statute or law their client Davis could have a right of action against plaintiff in error for injuries due to the negligence of his fellow servant Gordon as disclosed by the evidence, in the absence of the amendment of 1907 to Section 1970, Civil Code. How would they get past the very language of Section 1970 Civil Code as it existed before that amendment, i. e., "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the negligence of another person employed by the same employer in the same general business."

Counsel also urged that the case of *McLain* vs. *Dahlstrom Co.,* reported in California Appellate Decisions No. 736, is an authority in favor of their contentions. In that case the complaint averred that the injury was occasioned by defendant's negligent acts performed through a foreman. The Court held that the designation of the agent through whose acts the negligence arose did not detract from the force of the charge that defendant's negligence occasioned the injury. Counsel must have failed to observe that in that case the negligence alleged and proven was in the performance of the primary duty the defendant owed in supplying reasonably safe appliances; and, of course, this duty could not be delegated. Therefore, in alleging that an agent of defendant performed the negligent act, the plaintiff was simply giving defendant more information than the law required.

That case had no bearing upon a cause of action based on the amendment of 1907 to Section 1970 Civil Code.

In view of the errors of the trial Court hereinbefore referred to, we respectfully submit that the judgment should be reversed.

MAHAN & MAHAN,
KENNETH NEWETT, JR.,
LILIENTHAL, MCKINSTRY & RAYMOND,
Attorneys for Plaintiff in Error.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NORTH JUDICIAL CIRCUIT.

METROPOLITAN REDWOOD LUMBER COMPANY
(a corporation), *Plaintiff in Error.*
(Defendant below)

vs.

HUGH DAVIS
Defendant in Error.
(Plaintiff below.)

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT OF THE CASE.

The defendant in error prosecutes this action to recover damages for personal injuries received while at work, as a laborer for the plaintiff in error, in the logging woods of Humboldt County.

It is alleged in the complaint and admitted in the pleadings that on or about the 15th day of August, 1910, and for a long time prior thereto, the plaintiff in error con-

ducted logging operations on lands near Howe creek in the County of Humboldt, State of California; that said logging operations consisted in cutting down or felling redwood and fir trees, converting the same into saw logs and hauling or dragging the same by means of a wire cable attached to a steam engine, known as a Compound Yarder Donkey, to a landing, from which said logs were transported by a railroad to a saw mill to be manufactured into lumber. That said cable was about one and one-quarter inches in diameter and used for the purpose of hauling one saw log at a time over and along the road or drag-way to the landing, a distance of about four hundred yards. That said road or drag-way conformed to the lay of the land and has two straight courses, to-wit: the road or drag-way ran in a straight course from the landing, a distance of about three hundred feet and then turned at right angles pursuing the last course to the point where the logs were hauled from. That at the point or angle on the drag-way where the two straight courses meet, there was placed a "Tommy Moore" fastened to a large stump by means of a wire rope called a "Tommy Moore Strap"; that the "Tommy Moore" consisted of a large iron or steel block containing a swivel and weighing about six hundred pounds. That the "Tommy Moore" was so placed for the purpose of keeping the cable in position and was used for that purpose. That the cable passed through the "Tommy Moore" around the swivel therein contained and was thereby held in position. That the "Tommy Moore Strap" consisted of a wire rope about one inch in diameter and about thirty feet in length, the two ends of the

wire rope being fastened to the "Tommy Moore" and the loop of the wire rope was then placed over and around a redwood stump located on the side of the drag-way opposite the point where the "Tommy Moore" was placed. That on or about the month of May, 1910, the defendant in error was employed by the plaintiff in error as a "chasser" on said road or drag-way, and that his duties under such employment were to take charge of the "Tommy Moore," to tend to the cable and signal to the engineer who had charge of the Compound Yarder Donkey, when to stop and when to start the engine, while the saw log was being hauled or dragged over and along the drag-way to the landing.

It is alleged in the Complaint and the evidence shows that in the performance of the duties of his employment, the defendant in error was compelled to stand near the stump, around which the "Tommy Moore Strap" was fastened, in order to give the signals to his engineer. That in order to give the signals it was necessary for the defendant in error to stand in a position in plain sight of the engineer and at a point near the drag-way where he could have a plain view of the courses of the road or drag-way. The testimony is conclusive on this point and is as follows:

> (Defendant in Error) "If I stood any further than twelve feet I could not see the log, I might as well not be there at all. I could see the engineer at the same time. There was no other place where I could have stood and have seen the log and the engineer and performed my duties than the place where I did stand." (Tr. p. 57)
>
> "The foreman told me not to take this position.

Now he told me after I had gone down the road and at that time he was attending to a foul line when he told me that I had no business there, that my business was around this side of the stump. He told me that I was to be down here to give the signal, the engineer could not see me when I was up above. He said why aren't you down here. He told me my place was here. He said down here you belong. That was because I had to give the signal to the engineer and watch the log at the same time * * * He said I want you down here. I want you by the Tommy Moore. You can't give the signal up there. * * Mr. Spain did not warn me against standing too close to that stump. He never warned me about standing too close to that stump." (Tr. pp. 65-6)

"I had to be in that position to do my work. I took it because Spain told me to and because I had to be there any way, for both reasons. If Spain had not told me to I would have taken that position any way. I took that position before Spain told me at all." (Tr. p. 68.)

(Witness Laird) "This road came down the hill at right angles on the day of the accident, as compared with the landing. In other words, it was right straight up the hill from the stump. I do not think a person could act in the capacity the plaintiff was and stand in any other place, except at the stump. There was no other place where he could stand and see up the road, so as to see the log and at the same time see the engineer." (Tr. p. 75.)

It is alleged in the Complaint and proved without contradiction that the plaintiff in error carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore Strap" and that on the 15th day of August, 1910, said strap was in an unsafe and defective condition; that it was unsafe, defective and dangerous; that it was made out of an old, badly

worn, weak and rusty cable, and did not possess sufficient tensile strength to withstand the strain that was placed upon it. That on said day and while the strap was in said unsafe, dangerous and defective condition and while the defendant in error was engaged in the performance of the duties of his employment, the strap broke, by reason of the unsafe, dangerous and defective condition, and caused the injury complained of. The uncontradicted proof shows that the defendant in error suffered terrible and permanent injuries, being confined in a hospital for over one year and one-half, and left a helpless cripple for life.

ARGUMENT.

The Injury was caused by the breaking of a defective Permanent Appliance.

The "Tommy Moore Strap" was one of the permanent appliances or instrumentalities used in hauling or dragging all saw-logs situated tributary to the said drag-way. It was as much a permanent appliance or instrumentality, as the "Tommy Moore," the main cable, the donkey engine or the mill that manufactured the logs into lumber.

The following positive, unqualified testimony of Mr. Spain, the foreman of plaintiff in error, and the only witness produced on its behalf, establishes this important fact:

> "When this Tommy Moore was placed there in position, and held in position, by this Tommy Moore Strap, it was placed there for the purpose of remain-

ing there as long as they hauled down that way to the landing. It was a permanent contrivance to remain there as long as they used the road hauling logs down there to the landing, and the Tommy Moore did remain there during the time they used that landing and were hauling logs down by it." (Tr. pp. 97-8.)

Before logs are hauled to the landing, all the instrumentalities necessary to carry on the transportation are made and placed in position. First, the road or drag-way is made, the landing prepared, the donkey-engine placed in position on the landing, and the cable, some 1200 feet in length in this case, placed in position along the drag-way and maintained in position by the "Tommy Moore" and the "Tommy Moore Strap." It takes many days to construct and arrange these various appliances and instrumentalities before the real work of dragging the large saw-logs commences. All these appliances remain permanently in position until all the logs tributary to the drag-way have been hauled to the landing.

In the case at bar, all these appliances remained in their permanent place for many months and were intended so to remain until all the logs were transported from that particular territory. In addition to the direct admissions of plaintiff in error, all the surrounding circumstances of the work show that the machinery, appliances and instrumentalities used were permanently fixed before the defendant in error assumed the duties of his employment. The cable, the "Tommy Moore," and the "Tommy Moore Strap" were just as permanent instrumentalities as the railroad that hauled the logs from the

landing. In order to transport these large redwood logs from the forest, a logging railroad is first constructed along some convenient gulch, then cable roads are made up the ravines. These cable carriers are as complete in themselves as the railroad. The railroad is used until all the logs in the territory tributary to it are transported, the cable carrier is used until all the logs tributary to it are hauled to the railroad. Some of these cable carriers are used for years. The one in question was used for a season. Spain testified as follows:

> "I was the foreman of the Metropolitan Redwood Lumber Company on August 15th, 1910, at the time of this injury * * * Mr. Davis was a member of Red Gordon's crew * * * I remember the occasion of them going over to this particular place to work. I instructed them to go over there. I instructed Red Gordon. I told him to go ahead and make a road and pull logs. That means go over there and make his donkey site and get his road ready, there was grading to do upon the road there, get his strap ready and hang out his blocks and this "Tommy Moore," stretch his line." (Tr. pp. 88-9.)

The cable carrier is a complete instrumentality in itself and permanent in its use. There is no element of temporary character connected with it. It is not a temporary device to be constructed by the servants for their convenience in carrying on the work. It is a powerful machine or instrumentality made to withstand a pulling strength of from sixty to eighty horse power and used for the purpose of dragging along the drag-way logs six to eight feet in diameter and weighing many tons.

Sometime after this cable carrier with all its parts

and instrumentalities was constructed and placed in position to perform the work for which it was constructed, the defendant in error was employed as a "chaser" or tender of the Tommy Moore and entered upon the performance of his duties. He had nothing to do with the construction of any part of the cable carrier and was not present when this work was being done. He was not a member of the crew when the "Tommy Moore Strap" was made. His testimony stands admitted:

> (Defendant in Error) "I saw the strap the first day I was there. I saw the strap every day and every time a log came along, but I did not take any notice. I did not look at it to see if it was defective. I did not know whether that strap was defective or not * * * I did not see the strap made. * * * I do not know what they made it out of. I don't know where they got the cable to make it. * * * I saw it after it was made. (Tr. pp. 64-5.)
>
> "I saw the strap every day, the "Tommy Moore" strap was present in front of my own eyes, and the strap that caused the injury was present in front of my eyes every day. It was there but I did not pay any particular attention to it. I didn't take any particular notice of it, I could have examined it if I wanted to. I thought there was no need of it. I had no experience in lines, I could have examined it if I wanted to; there was nothing to keep me from examining the "Tommy Moore" strap used there. I didn't know it needed examining; in the first place I did not know anything about it." (Tr. p. 68.)
>
> "I never was there when this strap was made at all, I had nothing to do with the handling of it at all. I never put the Tommy Moore strap upon the stump. I never fixed the Tommy Moore strap at all. I had nothing to do with the placing of the Tommy Moore strap and nothing to do with this particular strap that broke." (Tr. p. 70.)

That the plaintiff in error carelessly and negligently failed and neglected to provide and maintain a safe and suitable "Tommy Moore Strap" and that said strap was in an unsafe and defective condition, when the injury was suffered, is proved beyond debate. In fact, it is admitted by the record.

The following is testimony of witnesses Laird, Carey and Brunnious on behalf of defendant in error:

> (Witness Laird) "I could not say exactly how long before the accident that strap was made; it had not had a great deal of use; it had been made quite awhile, but it had not been used much. It was approximately two or three weeks. Two other fellows and myself made that strap. They were Mike Carey and a man by the name—I don't know exactly what his name was but we called him Romeo. The hook tender instructed us to make that strap * * his name was Gordon. Gordon was the boss of the crew. Gordon pointed the cable out to us. He showed us the cable to make the strap of. * * He pointed it out to us. He told us to cut enough out of it to make a strap for the Tommy Moore and showed us the cable. I and these other gentlemen cut the strap off, cut off a piece rather from this cable and we made the strap." (Tr. pp. 71-2.)
>
> "It was a very poor piece of line in my estimation. * * * It was worn, you could tell by looking at it even, and without handling the line any at all, you could tell it was worn; in the first place it was small, I should not think that it was big enough to be used for a strap for a Tommy Moore from what I know about them. I should judge it was an inch and an eighth line in diameter, or it had been. The strands were worn. The strands would break off, when we would go to push them in through the wire, they would break; the wire strands would break and fly back when we pulled the line through. I went on and helped to

splice the line, with these other two gentlemen. It showed indications of being worn out. I had much difficulty in making that splice. After we had made it we took the strap to the stump and put it on the "Tommy Moore" and put it around the stump and connected it on to the "Tommy Moore." (Tr. pp. 72-3.)

(Witness Michael Carey) "The chain tender told me to make that strap. His name was Gordon. The hook tender told me where to get the cable to make the strap. He told us to make a strap and cut that out, and showed us what piece to take. He marked off the particular piece of the cable that was to be cut. * * * The cable was in a poor condition. The cable was worn out. We had trouble splicing it. We could not pull the strands through, it was all chipped and broken off, on account of the worn condition. It was rusted out." (Tr. pp. 78-9.)

(Witness Tom Brunnius) "The engine figured about eighty horse power. The gearings increasted the horse power. It was what they called a compound gear machine. Now the horse power of that engine is thirty-three thousand pounds, lifted a foot a minute. The cylinder capacity of the engine would figure out eighty horse power and it was sixteen to one. I never stopped to figure out exactly what strain the engine could put upon the cable. In plain English, it was a very powerful engine. It would break one of those cables at times, and according to the wire companies that manufacture that kind of cable, they claim will stand about seventy-two tons strain. The comparative strain on the cable fastening the "Tommy Moore" to that stump on the day of the accident, taking into consideration the right angled haul or pull, is considered twice the purchase on one single wire of that strap as upon the main line. But of course the strap being doubled, we have two parts, therefore on one part of the strap there would be the same strain as upon the main line. In other words if the strap was of the same size and the same tensile strength as the main line,

one way doubled around that stump would offset the power of the main line." (Tr. pp. 85-7.)

The facts of this case as disclosed by the record plainly show that the injury complained of was caused by the carelessness and negligence of the plaintiff in error in not providing and maintaining a safe and suitable "Tommy Moore Strap." This strap was a permanent appliance or instrumentality and the law imposes a primary duty on the master to exercise ordinary care in providing and maintaining such an appliance.

The trial judge, Hon. J. J. DeHaven, who recently returned unsullied to his Country the ermine cloak of the judiciary and passed to a higher world of merit, clearly stated the law governing this cause:

"I instruct you that it is the duty of an employer to use ordinary care to provide and furnish his employee with reasonably safe and suitable machinery and appliances, and places, upon which the employe is required to perform the work and labor of the employment for which the employee is engaged, and to use like care to keep the same in like condition after they have been so furnished and provided, and the law does not permit such employer to shift or transfer the responsibility for the performance of that duty to any agent or servant. He may employ agents or servants to perform such duty if he desires, but in case he does so, all negligence in the performance thereof is nevertheless deemed the employer's negligence, for which he is responsible to the employee injured thereby. The same duty devolves upon an employer in subsequently maintaining a machine or appliance in a reasonably safe condition as rested upon him when it was originally furnished to his servant. You will observe from that, that the degree of care required is simply orginary care."

(Instruction No. 5, Tr. p. 102.)

"A person who enters the service of another assumes all the ordinary risk incident to the employment in which he is engaged. While this is the law upon this subject, it is qualified by the rule that the employer is charged in law with the duty of not subjecting his employee to risks by his own negligence."

(Instruction No. 12, p. 104.)

"Under this rule the employer is required to use ordinary care, not only in providing reasonably safe instrumentalities, appliances and structures, but in keeping the same in reasonably safe and secure condition. The neglect of this duty is negligence upon the part of the employer, and if such negligence directly or proximately causes injury to the employe, he is responsible to the person injured thereby, unless the employee knew that such instrumentalities, appliances or structures used and operated in the business and work of the company at which the employee was engaged, were unsafe and unsound, and also fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, appliances or structures, and thereafter consented to use the same or continue in the use thereof."

(Instruction No. 13, Tr. p. 105.)

The learned Judge further instructed the jury in substance, that plaintiff in error was responsible for any negligence of Gordon, the hook tender, in the construction or use of the "Tommy Moore Strap."

The Plaintiff in Error Violated a Primary Duty.

It is the primary duty of an employer to furnish and maintain safe and suitable machinery, appliances and instrumentalities for his employes to work with, and this duty cannot be delegated to fellow-servants or co-

employees. Their acts are the acts of the employer, their negligence is his negligence. The Supreme Court of the State of California has, in a clear and forceful manner, stated the law on this subject.

> "The acts which the master as such, is bound to perform for the safety and protection of his employees cannot be delegated, so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or misfeasance is that of a superior officer, agent or servant, or of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees."
>
> Sanborne vs. Madera Flume Co., 70 Cal., page 265-6.

It was a primary duty of the plaintiff in error to supply and maintain a safe and suitable "Tommy Moore Strap," and having failed to do so, is liable, regardless of whose carelessness or negligence caused the injury.

The only question involved in cases of this character is, was the appliance or instrumentality a permanent appliance or instrumentality that the law imposes a pri-

mary duty on the master to furnish the servant? An affirmative answer completely disposes of any and all questions concerning the responsibility of the master for acts of fellow servants under the fellow servant rule.

In the case at bar, not only does the testimony introduced by the defendant in error prove that the "Tommy Moore Strap" was a permanent appliance or instrumentality, that the law places a primary duty on the master to furnish and maintain in a safe and suitable condition; but in addition the direct proof and admissions of plaintiff in error confirm the conclusion. As stated above, the foreman Spain, the only witness produced on behalf of plaintiff in error, testified, "When this Tommy Moore was placed there in position and held in position by this Tommy Moore Strap, it was placed there for the purpose of remaining there so long as they were hauled down that way to the landing. *It was a permanent contrivance to remain there as long as they used the road hauling logs down there to the land, etc.*" (Tr. p. 97-8.)

It will be noted that there is no controversy between the learned counsel for plaintiff in error and ourselves on the question whether or not the Tommy Moore Strap was a permanent appliance. Not only do they agree with us on that fact, but also on the trial the record shows that they assisted us in proving the same. They admit that the strap was a permanent instrumentality; they admit that it was negligently made and maintained; they admit that defendant in error was frightfully injured and left a helpless cripple for life; they admit (by infer-

ence) that plaintiff in error is responsible under the law for the injury, but plead in avoidance of the liability that defendant in error should have commenced some other kind of action, based on some fanciful theory of legal ledgerdemain, evolved from the fruitful minds of the learned counsel.

Plaintiff in error in its brief does not contend that the Tommy Moore Strap was a temporary device and therefore admits by silence that said strap was a permanent appliance as alleged in the complaint and shown by the testimony. Therefore we conclude that it is an admitted fact in the case that the strap was a permanent appliance or instrumentality and that under the law of the forum, a primary duty rested upon the plaintiff in error to furnish and maintain it in a safe and suitable condition. However, for the purpose of calling the attention of the Court to the rule laid down by the Supreme Court of California on the question of what is and what is not a permanent appliance or instrumentality, we beg to refer to certain decisions here enumerated. In substance it is held that where temporary structures, such as scaffolding, is erected by the employees themselves on which to work while performing their duties involved in the erection of and construction of a building, a primary duty is not imposed upon the master, but where the structure or device constructed becomes a permanent appliance, it is the duty of the master to make such appliance safe and suitable even though it was a temporary structure in the first instance. This rule is laid down clearly in the case of Hanley vs. California, etc., Co., 127 Cal., 232:

"Where a permanent tunnel is driven into a mountain to open up veins of mineral or pierces a mountain to furnish a permanent bed for a railroad, we think that as fast as it is completed, the finished tunnel becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted. Some of the great railroad tunnels of this century—for example the Hoosac and Mont Cenis Tunnels—required years for their completion from end to end. It would be most unreasonable to hold that the laborer employed upon the unfinished portion of one of these tunnels must take a fellow servant's risk in passing through miles of completed work to get to his place of employment; nor can we see that the case would be different where he himself helped to complete the finished portion."

In a recent case decided January, 1912, the Supreme Court of California upheld to the letter the doctrine relied upon by defendant in error, in the following language:

"Plaintiff's son and another mason built the faulty piers that finally collapsed under the weight of the wall constructed upon the I-beam which rested upon said piers. It is undisputed that plaintiff had nothing to do with the actual construction of these piers. He also testified that he was unaware of the method used in building them. Was plaintiff under such evidence, which the jury had a right to accept, in a position to deny that he was injured by the carelessness of a fellow servant? We must answer this question affirmatively. There was abundant testimony showing that the piers were mere tapering circular chimneys of half bricks, filled in with mortar and "sprawls" or fragments of brick. So constructed they were totally inadequate to carry the weight of the wall which was to be built above the I-beam. George Adele, one of the masons, testified that this method

of construction was followed by reason of the express direction of Connor, who promised a dollar to the man who would build the best looking pier. Wolf, one of the carpenters employed on the building, corroborated Adele in this statement. Connor admitted that he offered a dollar to the man who should construct the best pier and that after the north piers were built he gave each of the workmen a dollar. He denied giving any direction for the building of the piers in the manner described by Adele, but upon the conflict of evidence the jurors might well conclude that Connor ordered the men to construct the piers in a manner to leave them inadequate for the weight which was to be placed upon them, and that after they were so built his attention was particularly directed to them by reason of his promised reward to the builder of the most sightly column. According to the testimony of the plaintiff, Connor ordered him to proceed with the building of the wall after the I-beam had been placed on top of the north piers. Such a state of facts would not support the "fellow servant" doctrine. The place upon the wall where plaintiff was working at the time of the accident was unsafe and the negligence arising by reason of furnishing such a perilous place for the workman is chargeable directly to the master, and this is a rule even when the master has not, as here, actual knowledge of the danger. The piers, topped by the I-beam, constituted a means or appliance furnished for the prosecution of further work. In other words, this case is clearly within the doctrine of those which hold that a tunnel as fast as it is completed becomes an appliance furnished by the master by which the remaining work is to be prosecuted. (Hanley v. California Bridge Co., 127 Cal., 237; (47 L. R. A. 597, 59 Pac., 577) McRae v. Ericksen, 1 Cal. App., 236 82 Pac., 210). Essentially the same rule is also expressed in Mullin v. California Horseshoe Co., 105 Cal., 83 (38 Pac., 535), and Gelasso v. Natl. S. S. Co., 27 App. Div., 169 (50 N. Y. Supp., 417).

"The jury was also justified in finding plaintiff guilty of no negligence in failing to observe the faulty

condition of the piers. If he was, as he testified, actually ignorant of existing conditions he was under no obligation to investigate. Starr v. Kreuzberger, 129 Cal., 124 (79 Am. St. Rep., 92, 61 Pac., 787), Silveria v. Iverson, 128 Cal., 187 (60 Pac. 687); Oolan v. Sierra Railway Co., 135 Cal., 439 (67 Pac., 686)."

Majors v. Connor, 162 Cal., 134, 135.

In the case last cited the faulty pier that caused the injury was constructed by co-employees of the plaintiff, but as it was a permanent structure, when completed it became an appliance that the law placed a primary duty upon the master to furnish and maintain in a safe and suitable condition. In that case the plaintiff had nothing to do with the making or construction of the pier.

So, in the case at bar, the Tommy Moore Strap was a permanent appliance or instrumentality made, constructed and used for the purpose of carrying on logging operations. It was not a temporary device or structure, but on the contrary a permanent appliance absolutely essential and necessary in order to carry on logging operations and in order for defendant in error to perform the duties of his employment. Without it, the real work, for which the strap was made, could not be prosecuted. The defendant in error had nothing to do with the making of the strap. He was employed after the entire cable system had been constructed. He assumed the duties of his employment when the real work of hauling logs commenced (Tr. pp. 65 and 70). Under this state of uncontradicted facts, there can be no serious

debate on the question. Is the master (the plaintiff in error) primarily liable for injuries caused defendant in error, by reason of furnishing and maintaining an unsafe and dangerous strap? The courts are unanimous in holding the master primarily liable under such a state of facts. If the rule were otherwise, what protection would the average employe have? The average laborer is not a skilled mechanic having scientific knowledge and experience sufficient to protect him from working with or near dangerous and defective appliances. But on the contrary must rely upon the master's judgment in these matters. He goes to work where he is told and works with the appliances furnished him. In the natural order of human affairs, he is entitled to presume that safety is assured at least to an ordinary degree. In other words that the master has exercised ordinary care in surrounding the laborer with the instrumentalities to be used by him in the performance of the duties of his employment. The rigid enforcement of this reasonably humane rule of action is imperative under our civilization. The gigantic dangerous machinery, appliances and instrumentalities used in the commercial world of to-day are fruitful sources of misery and suffering. Our hospitals are crowded with maimed and crippled human beings by reason of the carelessness and negligence of employers in failing to furnish safe and suitable machinery and appliances, that the law demands. Whenever a servant is injured through unsafe appliances, the master invariably contends that the injury complained of was caused by the negligence of a fellow servant. And so in this case, learned counsel endeavor to urge the

fellow servant rule. We contend that the fellow servant doctrine is not involved in the case at bar.

An Employer Cannot Delegate the Performance of a Primary Duty so as to Avoid Responsibility for Its Improper Performance.

Where the master owes a duty to his employee, he cannot escape responsibility for its proper performance by delegating its performance to another servant, as the latter in such a case becomes a vice-principal, representing the employer.

This principle is forcefully enunciated by the District Court of Appeals, Third Appellate District, California, in the Case of Ryan vs. Oakland Gas Co. In that case the plaintiff was employed by defendant in digging a trench for the purpose of laying pipes therein. A portion of the trench was properly braced, but the portion where the plaintiff was injured by reason of the walls caving in, was not braced. A man by the name of Welling was foreman of the crew and directed the work. It was no part of plaintiff's work to do the bracing. In the language of the Court:

> "Dillon was specially employed to do this (the bracing) under the direction of either the superintendent or, in his absence, the foreman, and their relation to the work was such as not only gave them authority to determine whether cribbing should or should not be used as their judgment might dictate, but devolved this duty upon them. Nor can we admit the soundness of defendant's argument that Kirk and Welling were fellow servants with plaintiff, thus

giving effect to the rule in such cases and relieving the defendant from liability. That the place in which plaintiff was working was dangerous is not seriously disputed; that he had no warning of the danger, except such as his own judgment would suggest to him, is not questioned; that the superintendent knew of the danger is manifest from the fact that he caused the trench to be braced until Grove street was reached; and it was by his direction that the ditch along Grove street was not cribbed. Plaintiff had nothing to do with this part of the work except as directed by the superintendent or foreman; his work was with the pick and the shovel and he had a right to assume that the superintendent was guarding his safety in the place where he was working so far as this particular work of cribbing or bracing was concerned. We entertain no doubt from the facts disclosed in this that Kirk certainly, and we think also, Welling, was the agent of defendant, or its vice-principal. What was said in O'Connell v. United Railroads, 14 Cal. App. Dec., 656, 658, 124 Pac. 1033, 1030, is equally applicable here: 'It may be said to be true that, in a general sense, or generally speaking, the motorman and conductor of an electric work-car are fellow servants, but the books are full of cases showing where one fellow servant, in the discharge of a particular duty for his employer, may become, by reason of the peculiar nature of such duty, the master's agent so as to bind the latter for any damage resulting from its negligent execution. The rule is that where the master owes a duty to his employee he cannot escape responsibility for its proper performance, or liability for an injury to one servant occasioned by a failure to perform such duty, by delegating its performance to another servant. (Tedford v. Los Angeles Elec. Co., 134 Cal., 79).' In the Tedford case the Court said: 'The fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer —sometimes called a vice-principal. In such case neg-

ligence of the servant is the negligence of the principal, for which the latter must answer.' "

California Appellate Decisions, Vol. 16, No. 787, page 105. Date of decision January 13th, 1913.

Gordon Was a Vice Principal.

Under the authorities Gordon was a vice principal. He had charge of a crew. Mr. Spain, witness for plaintiff in error, testified that Davis, plaintiff in error, Carey, Breunius, Laird, and Texas Jack were members of said Gordon's crew (Tr. p. 88.). Gordon was boss of the crew (Tr. pp. 76-7.). "Gordon was foreman of the crew and he had full charge." Witness Carey (Tr. p. 86). "A man by the name of Gordon had charge of that crew there," witness Breunius (Tr. p. 84.). He had full charge of the preparation of the place where plaintiff was put to work and had full charge of the installation of the appliances and machinery by means of which the work was done. Plaintiff in error fully established this by Spain, who testified: "I instructed Red Gordon. I told him to go ahead and make a road and pull logs. That means go over there and *make his donkey site* and *get his road ready;* there *was grading to do* upon the road there, *get his strap ready and hang out his blocks and this Tommy Moore* and *stretch his line.*" (Tr. p. 88.) This constituted Gordon a vice principal.

Our California Supreme Court sustained this view in Brown v. Sennet, 68 Cal., 229, which held:

"The defendants abdicated the control and man-

agement of the entire work to the foreman, and gave him *full discretion* to control and supervise it. 'I was,' testified the foreman, 'foreman of the job, * * and superintendent for them.' Under that delegated power the foreman was therefore in the performance of the 'job' in the place of the master."

In Nixon v. Selby Smelting Co., 102 Cal., 463, the same court held: (italics ours)

"But in so far as Helm was *authorized* and employed to *prepare the places* in which other servants were to work, or to *furnish* the *machinery or appliances* with which they were to work, he represented the corporate defendant, and his negligence in the performance of these services was the negligence of the defendant, for the injurious consequences of which to other servants, without their fault, it is responsible to the same extent it would have been if such *places, machinery*, and *appliances had* been *prepared* and *furnished* through the *immediate agency of Mr. Roff, the superintendent*, or *by Mr. Bill*, the special superintendent of the silver room."

In Higgins v. Williams, 114 Cal., 182, the same doctrine was approved and affirmed, the Court holding:

"It already appears that the *machine was set up and put to work under the direction* and superintendence of Mr. Wilson, who was foreman and manager for the defendants. It was defective and unsafe because no key was put in the pin to hold it in place, and hence the accident. *Wilson knew of this defect, or should have known of it, and his knowledge was the knowledge of defendants.* In performing his duty he acted not as a fellow servant with plaintiff, but as the representative or agent of defendant and for his negligence they are responsible."

The selection of the strap devolved upon Gordon, the foreman, and the crew had nothing to do with its selection. Witness Laird: "Gordon pointed out the cable to us. He showed us the cable to make the strap of." (Tr. p. 72.) Witness Spain for plaintiff in error: "The hook-tender, Gordon, had charge of the selection of the rope that was used for any purpose by the crew." (Tr. p. 90.) "Red Gordon had the selection of any rope or cabel that was used on any of these operations." (Tr. p. 91-2.)

The *crew under Gordon* did *not* have the *right to select the "Tommy Moore"* strap and the principle contended by plaintiff in error concerning construction by employees of appliances out of materials furnished therefor does not apply. The crew under Gordon could exercise no choice whatever as to what material should be used. They had no voice or discretion whatsoever in the matter. They could only make the strap out of the material that Gordon directed them to take. Counsel has overlooked the distinction between a case where the employees generally have the right of selection and a case where the selection is left to the foreman alone without giving the employees under him any choice as to what materials or appliances should be used. This distinction is clearly pointed out in Wall v. Marshutz & Cantrell, 138 Cal., 526, where the Court said: (our italics.)

> "But the principle stated applies only to cases where the *selection* of the tools used in the work devolves upon the employees engaged in the work generally, one of whom is the person injured, and not

where *it devolves exclusively upon the foreman of the work.*"

In so far as the crew under Gordon was concerned they were furnished the defective material out of which the strap was made and *only that material.* The crew *under* Gordon was *not furnished* with *any other* material except that. If there was any other material, it was not furnished to the *crew under* Gordon, as they were ordered to use the particular cable out of which the strap was made, and *none other.* They had no authority to use any other.

"Where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine of fellow servants has no application."

North Chicago Rolling Mill Co. v. Johnson, 114 Ill., 57.

Then again, defendant in error had nothing whatever to do with the furnishing or adjustment of the appliances with which he was to work, or the preparation of the place where he was to work.

A foreman for a mining company who has full control of the property, employees, tools, materials, and has charge of the management and development of a mine, is a vice principal.

Kelley v. Fourth of July Mining Co., 16 Mont.,484.

A foreman in charge of a distinct piece of work in an extensive foundry, and having *under him laborers bound to obey his orders*, is as to them a *vice principal* to their employer, and not their fellow servant, and this although another may be a general foreman of the entire establishment with authority over him. (italics ours.)

Hawlins v. Allen & Co., 74 Mo., 13.

Skelton v. Pacific Lumber Co. is another California case which supports the theory of defendant in error that Gordon was a vice principal.

As the Plaintiff in Error Violated a Primary Duty, the Effect of the Amendment to Section 1970 of the Civil Code of the State of California Is Immaterial.

Learned Counsel for the plaintiff in error base their entire argument on the question as to whether or not the amendment to section 1970 of the civil code of California created a new cause of action. This contention raises purely a moot question that is foreign to matters before the Court in the case at bar. In their brief they assume that no primary duty on the part of the master exists here and from this unwarranted assumption they proceed in extenso to reason out a technical theory of pleading, that has neither merit nor wisdom to commend it for serious consideration. The complaint states in plain language the cause of action reiled upon, and the record shows that this cause of action was unassail-

ably sustained by the proof. The gravamen of the action is that the plaintiff in error failed to furnish and maintain a safe and suitable appliance, which caused the injury. This being a primary duty imposed on the master, that can not be delegated by him so as to relieve him from liability, he is not permitted to raise the issue as to whether or not the negligent act was done by a fellow servant.

The Ultimate Facts Are All that the Complaint Is Required to Allege.

It is a fundamental principle of pleading that the *Complaint must allege the ultimate fact relied upon to sustain the cause of action.* Evidence of the proof of such fact has no place in the Complaint. In the case at bar the negligence of the master in failing to furnish and maintain a safe and suitable Tommy Moore Strap is the ultimate fact to be proved in order to establish his liability under the common law or under section 1970 of the Civil Code. The negligence of certain enumerated servants in Section 1970 is made the negligence of the master. In other words the master is responsible for their negligence in performance of their duties. Therefore an allegation of negligence on the part of the master is proved by establishing the negligence of the servant named in section 1970. To allege in detail the names of the particular servants and their positions of employment, whose acts make the master liable, could not add to the efficacy of the pleading. At the utmost,

such an allegation could only tend to enlighten the plaintiff in error as to these particular matters. If the plaintiff in error desired further amplification of the Complaint, it should have demurred specially. Having failed to demur specially to the Complaint, it is too late now to raise the point. As a matter of fact the record shows that the plaintiff in error had all the information and enlightenment necessary to make its defense, if it had had a defense.

If a complaint is general in its allegations of negligence and the defendant desires to know upon what particular acts of negligence the plaintiff relies, he must move to have the complaint made more definite and certain, and failing in this the plaintiff may introduce any competent evidence tending to show the negligence of the defendent.

Johnson v. Southern Ry. Co., 69 Am. St. Rep., 849.

Omaha, etc., v. Crow, 69 Am. St. Rep., 741.

Price v. Atkinson, etc., 62 Am. St. Rep., 625.

Fremont, etc., v. Harlin, 61 Am. St. Rep., 578.

Mississinewa Mining Co. v. Patton, 28 Am. St. Rep., 208.

Ohio, etc., v. Walker, 3 Am. St. Rep., 638.

A corporation acts through its agents or representatives. It cannot be otherwise. Its various representatives have different duties to perform. The president has certain duties, the manager certain duties, the superintendent certain duties; and in the case at bar the

foreman (Gordon) had certain duties to perform for the corporation. As testified to by Spain, the superintendent, it was the duty of Gordon as foreman to prepare and use the Tommy Moore Strap, and any carelessness or negligence of his is, in law, the carelessness and negligence of the corporation he represents.

That ultimate facts are only to be pleaded is amply and clearly supported by McGonigle v. Kane, 20 Colo., 292, in which the Court said (italics ours):

> "As a rule, negligence may be pleaded generally. It is an ultimate fact and only ultimate facts are to be pleaded. Bliss in his work on Code pleadings, Note 211a, says: 'The general allegation of negligence is allowed as qualifying an act otherwise not wrongful. It is not the principal act charged as having caused the injury, but it gives color to the act, makes it a legal wrong; it is the absence of care in doing the act.' Negligence being the ultimate fact to be established, a general allegation is sufficient. 'To allege more,' says Rothrock, J., in Grinde v. Milw. & St. Paul R. Co., 42 Iowa, 376, 'would be to plead *the evidence*, which is not allowable.'"

In the case of McLain v. Dahlstrom Metallic Door Co., et al., decided July 16, 1912, by the Appellate Court of the Second Appellate District of California and reported in Vol. 15 Cal. App. Dec., 112, a demurrer was interposed on the ground that the designation of the servant through whose acts the negligence arose detracted from the charge that defendant's negligence caused the injury. The Court held that such allegation did not vitiate the pleading, but clearly recognized that the real issue was the defendant's negligence.

In pleading the execution of a contract, all that is necessary is to allege that the party sought to be charged executed it. Such an allegation is sustained by proof that the contract was executed by a duly authorized agent, within the scope of his authority. If the plaintiff in error was charged with the purchase price of the strap, all that would be necessary to allege was that it agreed to buy it and had not paid for the same. This allegation would be sustained by proof that the buying was done by a person who in law would bind the plaintiff in error and whose agreement to purchase would be its agreement. So an allegation that plaintiff in error negligently furnished and maintained an unsafe "Tommy Moore" strap would be sustained by proof that the furnishing and maintaining of such strap was done by a person whose negligent act would in law be the negligence of the plaintiff in error. To attempt to distinguish between the two cases as to pleading would be to offend common sense.

The Fellow Servant Rule Is a Defense Under the Laws of the State of California.

While we are loath to take up the time of the Court in discussing a moot question, yet we cannot refrain from answering the contention of learned counsel for plaintiff in error by stating that their interesting theory of pleading is not upheld by the law of the forum. The Supreme Court of California has repeatedly held that the doctrine of fellow-servants is a *defense*. Unless the defendant pleads affirmatively the fellow servant rule as a defense, he is not permitted to rely upon it. If the

defense is not pleaded in the answer, nor in any other way, and the evidence shows the injury to have been caused by the negligence of a fellow servant, the plaintiff can recover, as the question of fellow servant is not at all involved in this case. This is sustained by Himmelman v. Cofran, 36 Cal., 411, in which the Court decided:

> "If the defendant had desired to set up as a defense that the order to move the car was not given by the defendant, but by the foreman of its blacksmith shop, it should have made the proper averments to that effect in the answer, *in order that an issue might be raised in that point. No such issue having been made or tendered, the instructions which were refused were irrelevant.*" (our italics.)

In Bjorman v. Fort Bragg, etc., 104 Cal., 629, the Court, referring to the negligence of a fellow servant, said:

> "This was an affirmative defense, and the burden was clearly on the defendant to establish it."

In Gibson v. Sterling Furniture Co., 113 Cal., 6, it was claimed that the injury resulted from the negligence of a fellow servant. The Court held otherwise, as "there was no such issue or question in the case in the pleadings."

Again the above rule was approved and affirmed in Tayng v. Mt. Shasta, etc., Co., 135 Cal., 143, when the Court held:

> "*The negligence of a fellow servant can only be invoked when it is set up as an affirmative defense to a right of recovery.*" (our italics.)

That the object of the amendment of 1907 is to curtail a defense has been decided by the Supreme Court in two recent cases. In the case of Pritchard v. The Whitney Estate Company, decided June 13th, 1913, the Court stated:

> "The main purpose of the amendment to that section, adopted in 1907, was the modification of the 'fellow servant' doctrine whereby only pleading and proof that the injury or death was caused by the negligence of a co-employee in the same department of labor with the person injured or killed was available as a defense. *The legislature might well have believed that in thus curtailing this defense* * *"

43 Cal. Decisions, page 678.

So in the case of Judd v. Letts, 158 Cal., 359, the Court said, referring to the amendment:

> "While the proviso is framed in a manner that may leave a doubt concerning the proper relation of some of the phrases, we think it quite clear that the intent of the amendment was to take from all classes of employers the benefit of the fellow servant rule, in cases where the employee injured and the one at fault are engaged in different departments of labor."

Plaintiff in Error, by Its Answer, Put In Issue the Negligence of the Foreman Gordon.

The Answer alleges:

> "And for a further and separate answer and defense herein, the defendant alleges, upon information and belief, that the injuries alleged to have been caused by the negligence and carelessness of a fellow servant of said plaintiff, then in the employ of the defend-

ant and engaged in the same general business and particular occupation as and with said plaintiff." (Tr. p. 39.)

This allegation is broad enough to cover and include any person employed by plaintiff in error in the same general business in which defendant in error was employed.

This includes all the employees whose negligent acts, under the amendment to section 1970 Civil Code, cannot be plead by plaintiff in error as a bar to its responsibility. There are certain fellow servants whose acts of negligence cannot now be plead as a bar, although employed in the same general business as the injured employee. But plaintiff in error, instead of confining his defense to just that particular kind of a fellow servant whose negligent acts could be plead as a bar, alleged that the injury was caused by the negligence of a person employed in the same general business, which would include the foreman, Gordon, performing a non-primary duty. A superior or a person employed at another machine in the same line of work, would be a person employed in the same general business. Among those employeees engaged in the same general business there are now certain accepted ones whose acts cannot be plead as a bar. Plaintiff in error paid no attention to these, but pleaded as a defense as well the negligence of fellow servants for which he was responsible as the negligence of those for which he was not responsible. Instead of eliminating superiors, he included them.

If it were contended, however, that the allegation only referred to employees for whose acts the employer

is not responsible, evidence would be admissible on the part of defendant in error to overcome this by showing that it was done through the negligence of a fellow servant whose acts was not a bar.

Plaintiff in error also set up special defenses as follows:

> "And for a further and separate answer and defense herein, the defendant avers that the injuries alleged to have been suffered by plaintiff were the result of plaintiff's own carelessness and negligence." (Tr. p. 39.)

It also alleged that the carelessness and negligence of the defendant in error directly contributed to and were the approximate causes of said injuries (Tr. pp. 39 and 40). All these new matters and defenses set up in the answer are deemed denied by defendant in error under section 462, Code of Civil Procedure of the State of California, and any evidence tending to overcome said new matter or defenses or disprove the same becomes relevant and material under the pleadings. In other words, under the allegation that the "injury was caused by the negligence of a fellow servant in the same general business as defendant, *evidence that the foreman Gordon, negligently caused the injury was admissible, and his negligence became an issue in the case;* under the allegation that the injury was caused by the negligence of defendant in error and that his negligence was the proximate cause of the injury, *evidence that it was caused by the negligence of the foreman, Gordon, was admissible to disprove that it was caused by the negligence*

of defendant in error *and Gordon's negligence thereby became an issue in the case.*

Plaintiff in error, referring to the Tommy Moore strap, also alleged "that defendant used ordinary and reasonable care in the selection of the same." (Tr. p. 35.) Under this allegation evidence was admissible to show how the selection was actually made.

In Rankin v. Sisters of Mercy, 82 Cal., 95, the lower court admitted an instruction on undue influence to the jury and the defendant objected on the ground that there was no such issue. The defendant was not sustained on this point as the issue was raised by defendant's answer, the Court saying:

> "We think that the *issues raised by the pleadings* were sufficient to justify the instruction. Under our system of pleading, the plaintiff is not required to reply to any new matter or affirmative defense set up in the answer, *but it is deemed denied and may be met by any competent proof.*" (our italics.)

Referring to Moore v. Copp, 119 Cal., the Appellate Court in Barker v. Barker, 9 Cal. App., 740, said:

> "It was contended by appellant in that case that the *special issues* were *improperly allowed because not alleged in the complaint.* The Supreme Court held against this contention, saying: 'In the first instance the law requires defendant to answer; but when he does so, the law in the other instance operates to make the answer for the plaintiff without any replication on his part.' *The many cases decided show various issues thus permitted to be tried.*" (our italics.)

Note the following language in said Barker v. Barker, 9 Cal. App., 741, to-wit:

> "The defendant, having in his answer and not by way of cross complaint, set forth the nature of his claim, it indeed would be a curious rule of pleading under our system *which would estop her from proving, under the pleadings as they appear here, any fact which would tend to disprove the spuriousness of his claim.*" (our italics)

So, in the case at bar, there was nothing to estop defendant in error from *proving the spuriousness* of the claim of plaintiff in error that the negligence of defendant in error caused the injury by showing that Gordon's negligence caused the same.

The point here raised was squarely decided against plaintiff in error in Magee v. N. P. C. R. R. Co., 78 Cal., 435, where the Court, in passing upon the overruling of an objection to a question asked plaintiff if he knew of the defect causing the injury, it not being alleged in the complaint that he knew of the defect, said:

> "We think is was relevant; for while, as has already been shown, the complaint contained no allegation of plaintiff's ignorance, the answer 'alleges and charges the fact to be, that whatever injuries were sustained by said plaintiff were caused solely and wholly by his own carelessness and negligence, and that but for his own carelessness and negligence he would not have been injured.' This allegation must be deemed denied by plaintiff, *and it raised an issue to which the evidence was applicable*, and if so, *such evidence was not irrelevant nor incompetent.*" (our italics.)

The doctrine of aider by the pleading of the opposite party is discussed by Bliss in his work on Code Pleading under section 437 of said work. Mr. Bliss says:

> "It is a rule of common law that an omission to state a material fact, either in the declaration or special plea, may be supplied by the pleading of the opposite party * * When the defendant chooses to understand the plaintiff's count to contain all the facts essential to his lability and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy.' * * There is nothing technical or artificial in this doctrine of aider, and it continues to be recogniezd in Code pleadings."

Conclusion.

The evidence clearly shows that the "Tommy Moore" strap was a permanent appliance and that plaintiff in error violated a primary duty in furnishing a defective one, and that Gordon was a vice principal. The contentions of plaintiff in error are entirely foreign to the real issues involved, as a primary duty was negligently performed. Even if a primary duty had not been violated the complaint would be sufficient, as the amendment to section 1970 only curtailed an affirmative defense, and the ultimate fact is all that is required to be pleaded. The acts of the foreman, Gordon, were not only put in issue by the complaint, but also by the affir-

mative defense set up by the answer of the plaintiff in error.

We respectfully contend that judgment should be affirmed.

PUTER & QUINN,
Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH ~~NORTH~~ JUDICIAL CIRCUIT

METROPOLITAN REDWOOD LUMBER COMPANY (a corporation),
Plaintiff in Error.
(Defendant below.)

vs.

HUGH DAVIS,
Defendant in Error.
(Plaintiff below.)

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

At the oral argument of this case, certain questions were discussed as to which permission was granted by this Court to file a supplemental brief.

To discuss these questions in order:

I. CAUSE OF ACCIDENT.

FROM THE EVIDENCE ADDUCED, THE CAUSE OF THE ACCIDENT WAS MERELY A MATTER OF CONJECTURE, AND VERDICT BASED THEREON CANNOT STAND.

The *only* evidence as to the accident itself is contained at pages 60 and 61 of the transcript, and is as follows:

Plaintiff testified (p. 60):

"When this accident happened the log was not on my section. I was watching for it to come into my section. Then the strap broke. The strap that was around the stump, the "Tommy Moore" strap on this side, and it threw it around and hit my leg . . ."

And again at page 61:

"It was the end of the cable that struck me . . . It was the end of the line that struck me. It broke on the opposite side and swung around. It was the end of it hit me, but I don't know how near it was to the end of the line. It was something like two feet or three feet."

The strap itself was not offered in evidence and the only fact shown is that somewhere along its length it broke.

It should be noted that this very strap had been in use continuously for two or three weeks before the accident. As to this, plaintiff's witness Laird testifies (tr. p. 71):

"I could not say exactly how long before the accident that strap was made . . . It was approximately two or three weeks."

Plaintiff himself at page 64 testifies that in about fifteen days it worked eight or nine days and that in these days

"They may have pulled on some days twenty, some days thirty, some days they would not pull in ten."

It was not shown that any accident had happened in the use of this strap before, although plaintiff, himself, worked with it and in its immediate vicinity during all of that time.

Again it was not shown that the load carried at the time of the accident was less than or equal to the usual haul.

Certainly from these facts it would not appear that the break was due to any inherent defect or weakness in the strap.

To say nothing of the possibility that the break might have been caused by an excessive strain, whether through weight of the load or its having been caught in some obstruction on the ground, it was again equally possible that the break occurred at the splicing.

Plaintiff's witness Laird testifies at page 73:

"I had much difficulty in making the splicing."

And Casey, also plaintiff's witness, testified at page 79:

"We had trouble splicing it. We could not pull the strands through."

The accident ,then may have happened through any one of several causes:

1. The alleged insufficiency of the strap.
2. A latent defect in it.
3. Its improper use or over-straining.
4. The improper splicing.
5. Its improper adjustment to the stump.

There was *absolutely nothing* in the evidence to show to which of these causes the accident was attributable, and under these conditions a verdict for plaintiff must have been based on mere conjecture and cannot stand.

Almost the same conditions existed in the case of

Pierce v. Kile, 80 Fed. Rep. at 867;

an action by employee against his employer, based on the breaking of an allegedly defective rope.

In ruling that defendant was entitled to a directed verdict, the Circuit Court of Appeals for the Seventh Circuit, said:

> "There was no evidence, other than the fact that the rope broke, to suggest insufficiency or defect. The general rule is not disputed that, as between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master. (Citing cases.) The proof to warrant such inference must be brought forward by him who charges

the negligence, and upon whom is the burden of proof. *The inference of negligence cannot be established by conjecture or speculation, or drawn from a presumption, but must be founded upon some established fact.* The law of the case was correctly apprehended and stated by the court in its charge to the jury, but the court erred in not directing a verdict for the defendant below. There was absolutely no evidence, other than the fact of the breaking of the rope, from which negligence of the master could justly be inferred. *The accident may have occurred from* (1) *the insufficiency of the rope,* (2) *a latent defect of the rope,* (3) *its improper use and overstraining,* (4) *the manner of its adjustment to the standard,* (5) *the character of the standard used.* It is urged that it was proper to submit the case to the jury upon the ground that they had the right to infer that the rope was insufficient, for the reason that the other possible causes of the accident were excluded by the evidence. This reasoning is fallacious in its premises. The evidence did not exclude all other probable causes of the breaking of the rope. To the contrary, it suggests as strongly probable that the accident was due to a great and inconsiderate strain upon the rope during the obstruction of the pile, and while Davis was endeavoring with the pinch bar to overcome the obstruction, and before it could be surmounted, and through the great lateral strain upon the rope caused by the pulling on it by 15 or 20 men while the pile was thus obstructed. Whether that be the correct solution of the cause of the accident or not, it is certain that not only were all other probable causes of the insufficiency of the rope not excluded by the evidence, but the testimony clearly established its sufficiency. The plaintiff below, therefore, had failed to establish any neglect of duty upon the part of the defendant below causing this injury, and it was error not to direct a verdict as requested."

It will be seen that *practically every possibility adverted to by that Court exists in this Case.*

The leading case on this subject is

Patton v. Texas, etc., Rd. Co., 179 U. S. 658, 45 L. Ed. 361;

where the Supreme Court lays down the rule as follows:

> "It is not sufficient for the employee to show that the employer *may* have been guilty of negligence; the evidence must point to the fact that he *was. And when the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.* If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from *settled rules of proof resting upon all plaintiffs.*"

The same rule is laid down in the Federal Courts in

Northern Pac. Co. v. Dixon, 139 Fed. 740;
Moit v. Ills. Cent. R. Co., 153 Id. 356;
Carnegie S. Co. v. Byers, 149 Id. 669;
Minneapolis, etc., Co. v. Cronin, 166 Id. 659;
Midland, etc., Co. v. Fulgham, 181 Fed. 95.

And as recently as in the case of

Smith v. Ills. Cent. R. Co., 200 Fed. at 555.

To these may be added the case of

Hofnaner v. White, 70 N. E. (Mass.) 1038

when the Court said:

> "*If there were other causes* besides the fact of the fall of the chest itself that may have produced such a result, the *plaintiff is obliged to go further and eliminate them by showing that they did not operate.*"

And the California case of

Puckhaber v. S. P. Co., 132 Cal., at 365,

where it is said:

> "It would be a guess, pure and simple, upon the part of the jury to so find as a fact, *and a verdict and judgment cannot rest upon a foundation created upon a guess.* It is as necessary for the plaintiffs to show that defendant's negligence caused the injury, as it is for them to show that defendant was guilty of negligence, or that the party was injured."

Of the five possibilities of the cause of the accident heretofore enumerated, there was only one for which defendant could have been held liable—the first. For the second it would not have been liable, and for the third, fourth and fifth it equally would not have been liable, because these were acts done by the fellow servants of plaintiff. The case then would come within the rule set forth in the Patton case

and the verdict would after all be a guess and unsupportable as a matter of law.

II. ASSUMPTION OF RISK.

Plaintiff Clearly Assumed the Risk of the Accident to Him.

The question of assumption of risk has so recently been passed upon by this Court in the case of

> Williams v. Bunker Hill, etc., Co. 200 Fed. Rep. 211,

that it will be unnecessary to add other Federal cases.

Reference may be made, however, to the clear statement of the doctrine and of its limitations in the case of

> Bresette v. Stone Co., 162 Cal. 74.

It is submitted that all of the elements necessary to constitute assumption of risk appear in this case.

1. Plaintiff's employment and duty brought him into the use of and close proximity to the strap.

As he states at page 64:

> "My duty was to watch the log through the 'Tommy Moore', through the 'Tommy Moore' block, and signal to the engineer, signal the engineer to go ahead as soon as I changed it over."

2. He worked with the rigging crew in work of this character from about April first, 1910, to August 15, 1910, when he was injured. (Tr. p. 63.)

3. He oiled this particular strap (Tr. p. 64).

4. He worked, in the discharge of his duties, with this particular strap, for about fifteen days (Tr. p. 64).

5. If there was any danger, it was an obvious one, as Laird testifies (Tr. p. 73): "It was worn; *you could not tell it by looking at it even, and without handling the line any at all, you could tell it was worn.*"

6. The employees were expected to look out for their own safety. As Casey testifies (Tr. p. 83): "We had to look out for ourselves above here."

7. And plaintiff fully knew and appreciated the danger. As he testifies (Tr. p. 69): "If the line would break or anything would fly I would be in danger. I don't know if the line was apt to break. It might break. I could not stand there and do my work anyway."

It is submitted that an assumption of risk is clearly shown and that plaintiff is not entitled to recover.

In the Williams case cited above, this Court says:

> "Williams, by entering upon and remaining in the employment of the mining company, assumed the ordinary risks and dangers of the employment he was in, and of the extraordinary risks and dangers of such employment which

> he knew and appreciated. But the risk of the mining company's negligence and of its effect were not of the ordinary risks of Williams' employment, unless such negligence or the effect thereof was known and appreciated by him, or was obvious; that is, plain to be observed and understood by him by reasonably using his senses. Of course, an employe who knows and appreciates the hazards of his service, and those risks which are apparent to ordinary observation, assumes the risks incident to his situation. Neither do we lose thought of the established rule that when a defect is obvious, or so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence, and experience, and the danger and risk from it are apparent, the servant will not be heard to say that he did not realize or appreciate them."

And in the course of the discussion, there is quoted the case of

Butler v. Frazee, 211 U. S. 459, 53 L. Ed. 281,

when the Supreme Court says:

> "Where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

III. KNOWLEDGE OF DEFENDANT.

THE EVIDENCE FAILED TO DISCLOSE THAT DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT ANY MATERIAL FURNISHED by it was defective.

It is of course undisputed law that it must be shown by plaintiff that defendant knew or ought to have known that the appliance was defective. No such evidence appears here.

Even if it be conceded that the Foreman Gordon knew that the material he gave for the construction of the strap was defective, *there is no evidence that defendant furnished this to Gordon to be given to the crew.*

There was in the immediate vicinity of the work a new piece of cable of about four or five hundred feet out of which this strap could have been made (see testimony of Casey, Tr. p. 81; Spain, Tr. p. 89).

And there were also about two thousand feet of line, equally available, about seventy-five or eighty feet away. (Testimony of Spain, Tr. pp. 89, 97, 98, 99.)

Instead of using either of these, Gordon went quite a distance away and selected other material which it is claimed he stated he knew was defective.

While it is claimed that Gordon stated that "they" told him to take the old line, it is not shown who the

"they" were, and Gordon did not say who it was. (Tr. p. 74.)

While a master is of course liable for the acts of his servant, the imposition of such a liability here would strain the doctrine to the breaking point. Certainly it cannot be assumed either as a matter of technical law or of common sense, that when a master has at the very spot and in close proximity to that spot furnished adequate safe materials and appliances, he can be held liable when his employee, without his knowledge, does not use these but goes to a remote part of the plant and selects an obviously dangerous substitute.

For all the considerations above stated, it is respectfully submitted that the judgment be reversed.

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IN THE

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FOR THE

NORTH JUDICIAL CIRCUIT

METROPOLITAN REDWOOD LUMBER COMPANY (a corporation),

Plaintiff in Error.
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vs.

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(Plaintiff below.)

ANSWER TO SUPPLEMENTAL BRIEF.

Learned Counsel for Plaintiff in Error in their Supplemental Brief contend that, "*From the evidence adduced, the cause of the accident was merely a matter of conjecture and verdict based thereon cannot stand.*"

We submit that it is a *matter* of *conjecture* with us how the learned counsel came to such a conclusion, when the record shows beyond controversy that the strap was made of an old, worn out, rusty, worthless piece of cable that was not big enough to be used for a Tommy Moore

strap and that by reason of such condition the strap broke. The uncontradicted testimony of the witnesses Laird and Carey is conclusive on this point.

Laird testified:

"Well it was a very poor piece of line in my estimation." Page 72. "It was worn; you can tell by looking at it even, and without handling the line at all, you can tell it is worn; in the first place it is small. I should not think that it was big enough to be used for a strap for a 'Tommy Moore' from what I knew about them. I should judge it was *an inch and an eighth line in diameter or it had been.* The strands were worn. The strands would break off, when we would go to push them in through the wire, they would break; the wire strands would break and fly back when we pulled the line through. I went on and helped to splice the line with these other two gentlemen. *It showed indications of being worn out.* I had much difficulty in making that splice." Page 73.

Witness Carey testified, page 79:

"The cable was in poor condition. The cable was worn out. We had trouble splicing it. We could not pull the strands through; it was all chipped and broken off on account of the worn condition. *It was rusted out.*"

"The log was upon the runway when the strap broke. I did not see anything interrupting the log or striking stumps or anything of that kind. When the strap broke there was nothing in front of the log at the time. It was in the roadbed." Page 79.

Witness Breunius testified, page 86:

"When the accident happened it was an ordinary pull. We were pulling ordinarily when that gave away."

The testimony of Defendant in Error stands uncontradicted on the question as to whether the strap broke or the splice gave away:

"It was the end of the line that struck me. *It broke on the opposite side and swung around.* It was the end of it hit me, but I don't know how near it was to the end of the line. *It was something like two feet or three feet."* Page 61.

The above testimoney is a complete answer to the argument contained in Plaintiff in Error's Supplemental Brief. In substance the strap was constructed from unsafe and incompetent material and broke solely by reason thereof.

The uncontradicted testimony shows that the strap was made of an old, rusty, worthless piece of cable, entirely unfit to be used for the purpose of a Tommy Moore Strap and that the strap broke about two feet or three

feet from the end by reason of the lack of tensile strength sufficient to sustain the usual burden placed upon it. The engineer Breunius testified that "When this accident happened it was an ordinary pull. Carey testified that "When the strap broke there was nothing in front of the log at the time."

The record shows that the Plaintiff in Error failed to contradict any of the above positive testimony. Such being the case, the facts testified to are admitted facts in the case. *De hors* the record, if such testimony was untrue, it surely was an easy matter for Plaintiff in Error to show that fact. Why did not Plaintiff in Error produce the strap in evidence? It was in its power to do so, if there was any question as to the correctness of the testimony given in evidence in reference to the fitness of the strap and the place where it broke.

It is also contended that Defendant in Error "clearly assumed the risk of the accident to him." The record does not uphold such a conclusion. Section 1970 of the Civil Code of California provides: "Knowledge of an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee *fully understood, comprehended and appreciated* the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof."

The evidence shows without contradiction that the Defendant in Error had absolutely no knowledge of the defective or unsafe character or condition of the strap or *that he fully understood, comprehended and appreciated the dangers incident to the use of it.*

Defendant in Error testified (page 65):

"I saw the strap every day and every time a log came along, but *I did not take any notice. I did not look at it to see whether it was defective.* * * * *I do not know what they made it out of.*"

On page 68 he testified:

"*It was there but I did not pay any particular notice of it. I could have examined it if I wanted to. I thought there was no need of it. I HAD NO EXPERIENCE IN LINES.* * * * *I didn't know it needed examining; in the first place I didn't know anything about it.* * * * *I did not examine it. I did not know what size it was or anything about it.* * * * *I don't know if the line was apt to break.*"

On page 70:

"I never was there when the strap was made at all. I had nothing to do with the handling of it at all. I never put the 'Tommy Moore strap' upon the stump."

This testimony stands admitted and is a complete answer to the argument advanced by learned counsel in the Supplemental Brief.

We respectfully submit that the judgment be affirmed.

PUTER & QUINN
Attorneys for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN REDWOOD LUMBER COMPANY (a Corporation),

Plaintiff in Error,

vs.

HUGH DAVIS,

Defendant in Error.

PETITION FOR REHEARING.

Plaintiff in error respectfully petitions this Court for a rehearing of this cause upon the following grounds:

I.

That the evidence does not show that the "Tommy Moore" strap was a permanent device.

II.

That the evidence does not show beyond reasonable doubt that the accident was attributable to the condition of the cable.

III.

That this Court has not discussed or considered the argument of assumption of risk.

(1) In its opinion this Court finds that the device was a permanent one.

According to plaintiff's own testimony (Trans., p. 67, fol. 57) the line and, consequently, the strap was changed two or three times in two weeks, and according to testimony of the same witness (page 64, fol. 54) it had been there some nine or ten days before the accident, but they were not working more than half the time.

As appears throughout the testimony, this "Tommy Moore" strap was used as a means of changing the direction of the cable and was necessarily either shifted from stump to stump as the direction of the haul changed, or a new one was made from time to time, but every time that the direction of a haul was changed, the position of the strap was changed.

As testified by witness Spain (page 93, fol. 77), "These straps would have different lengths depending upon the location of the stump to the roadway. * * * *They have to make a new 'Tommy Moore' strap for each new direction* in which they draw the

logs, that is, unless it was a straight pull, or unless a former strap would answer the purpose. It is made with two eye splices in it, one on each end, one eye splice on each end, and as the crew are directed to go, or as they go to different logging operations, they themselves have to make a strap *for each new situation."*

This Honorable Court quotes a portion of the testimony of the same witness on page 97, folio 81, but while he states that it was a permanent contrivance, he states that it was permanent only as long as they used the road hauling logs *"down there to that landing."*

Certainly it should not be said that there was anything permanent in the contrivance in the way that a tunnel is permanent as was held in the case of *Hanley* vs. *Cal. etc. Company,* 127 Cal. 232, or in which piers are permanent, as was held in *Majors* vs. *Connors,* 162 Cal. 134-135, which are the cases relied upon by the defendant in error. The rule is rather that announced in *Leishman* vs. *Union Iron Works,* 148 Cal. 374, or *Callan* vs. *Bull,* 113 Cal. 593, or *Burns* vs. *Sennett,* 99 Cal. 363.

(2) We again respectfully urge that the evidence does not clearly show such a condition of the strap as to preclude the possibility that the accident arose because of some other circumstance. While this Honorable Court states that plaintiff in error had the possession of the strap and might have produced it in evidence, we submit that there is nothing in the evi-

dence to show this, and as far as the information received by the writer of this brief goes, plaintiff in error did not have the possession of the strap after the accident.

While it is true that witnesses testified that the outside strands were broken, still this was a cable of 1 1-8 inches in diameter, and as testified by Mr. Spain, any cable no matter what its inside conditon was, might be rusted within a night or two. (Trans., p. 96, fol. 79.) Nothing that was clearly testified to by any of plaintiff's witnesses definitely shows the presence of more than a mere surface rust, and certainly the fact that the outer strands would break off was no indication of any weakness in the tensile strength of the cable itself. Accordingly we respectfully urge again the argument set forth in pages 1-8 in the supplemental brief of plaintiff in error.

(3) This Honorable Court did not consider the question of assumption of risk argued in the supplemental brief.

It is stated in the opinion that the defects were visible to the eye and were patent. If this were so, the argument of assumption of risk becomes the more potent. We respectfully urge upon this Court the consideration of this phase of the matter.

All of the elements of assumption of risk occur in this case.

We are the more urgent in asking for a rehearing of this matter because in so far as the plaintiff in

error is concerned, the judgment seems unfair. It is true that the defendant in error was injured, but in order to hold plaintiff in error liable, there should be some clear legal ground of liability shown.

The rule of law is well established that there is no *absolute* liability on the part of the employer to furnish safe materials, but that he must exercise merely *reasonable care* in such supply, and when it is considered that practically at the very feet of Gordon there was cable adequate in amount and character for the purpose of making such a strap as should be needed, it would seem that plaintiff in error did exercise that *reasonable care.*

The foundation of all liability of negligence is the reasonable anticipation of what will happen in the event of a certain act, and most certainly it cannot be claimed that plaintiff in error could have reasonably anticipated that Gordon would have gone to a remote spot and overlooked the new piece of cable in the immediate vicinity of his work and the 2000 feet of cable about 75 or 80 feet away from him. It is as though a section boss on an extensive railway system were to go miles away from the place of the operations of a section gang, overlooking new material at his feet to supply to his gang defective material which he found at this remote spot. As was said in the supplemental brief, this would seem to be the straining of the doctrine of *respondeat superior* to the breaking point.

It is respectfully submitted that this cause be reheard.

LILIENTHAL, MCKINSTRY & RAYMOND,
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KENNETH NEWELL,
Attorneys for Plaintiff in Error.

I hereby certify that in my judgment the above and foregoing petition for rehearing is well founded and that it is not imposed for delay.

ALBERT RAYMOND,
Counsel.